

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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E*TRADE FINANCIAL CORPORATION and	:
E*TRADE SECURITIES LLC,	:
	:
Plaintiffs,	:
	:
v.	:
	No. 08 CV 2993 (RJH)
	:
MARCUS J. HERNANDEZ,	:
SEAN J. GAFFEY and BANC OF	:
AMERICA INVESTMENT	:
SERVICES, INC.,	:
	:
Defendants.	:
	:

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**DECLARATION OF DOUGLAS P. LOBEL
IN OPPOSITION TO DEFENDANTS' ORDER TO SHOW CAUSE**

1. I am a partner at Cooley Godward Kronish LLP, counsel of record in this action for Plaintiffs E*TRADE Financial Corporation and E*TRADE Securities LLC (together, “E*TRADE”). I am admitted to practice before the United States District Court for the Southern District of New York.

2. I respectfully submit this declaration to transmit to the Court certain documents in support of E*TRADE’s Response to Defendants’ Order to Show Cause.

3. Attached to this declaration as **Exhibit 1** is a true and correct copy of E*TRADE’s **Statement Of Claim** filed on March 24, 2008, in the matter styled *E*TRADE Securities LLC v. Marcus J. Hernandez, Joseph S. Reilly, Sean J. Gaffey, and Banc of America Investment Services, Inc.*, FINRA Dispute Resolution Arbitration No. 08-00871.

4. Attached to this declaration as **Exhibit 2** is a true and correct copy of a spreadsheet consisting of a compilation of E*TRADE’s internal Instant Message logs for Marcus

Hernandez, Scott Reilly and Sean Gaffey. At the request of my office, Richard Busby, E*TRADE's Manager of Security in the Corporate Information Security Department, retrieved the Instant Message records for Hernandez, Gaffey, and Reilly, and provided these records to my office.

5. Under my supervision, an associate from our office calculated the percentage of internal communications between Hernandez and Reilly using E*TRADE's record of Instant Messages for Hernandez.

6. Attached to this declaration as **Exhibit 3** is a true and correct copy of E*TRADE's **Memorandum Of Points And Authorities In Support of Plaintiffs' Motion For Preliminary Injunction In Aid Of Arbitration** filed on March 27, 2008, in the matter styled *E*TRADE Financial Corporation and E*TRADE Securities LLC v. Joseph S. Reilly and Banc of America Investment Services, Inc.*, Case No. 08-cv-1963-AHM, Docket No. 8, in the United States District Court for the Central District of California.

7. Attached to this declaration as **Exhibit 4** is a true and correct copy of **Declaration of Curt B. Radetich In Support Of E*TRADE's Memorandum Of Points And Authorities In Support of Plaintiffs' Motion For Preliminary Injunction In Aid Of Arbitration** filed on March 27, 2008, in the matter styled *E*TRADE Financial Corporation and E*TRADE Securities LLC v. Joseph S. Reilly and Banc of America Investment Services*, Case No. 08-cv-1963 (AHM), Docket No. 7-7, in the United States District Court for the Central District of California.

8. Attached to this declaration as **Exhibit 5** is a true and correct copy of **Exhibits 7 and 8 to Declaration of Curt B. Radetich In Support Of E*TRADE's Memorandum Of Points And Authorities In Support of Plaintiffs' Motion For Preliminary**

Injunction In Aid Of Arbitration filed on March 27, 2008, in the matter styled *E*TRADE Financial Corporation and E*TRADE Securities LLC v. Joseph S. Reilly and Banc of America Investment Services, Inc.*, Case No. 08-cv-1963 (AHM), Docket Nos. 7-14 and 7-15, in the United States District Court for the Central District of California.

9. Attached to this declaration as **Exhibit 6** is a true and correct copy of Letter from Douglas P. Lobel to Vanier Martin (FINRA Case Administrator) sent on April 17, 2008, in the matter styled *E*TRADE Securities LLC v. Marcus J. Hernandez, Joseph S. Reilly, Sean J. Gaffey, and Banc of America Investment Services, Inc.*, FINRA Dispute Resolution Arbitration No. 08-00871.

10. Attached to this declaration as **Exhibit 7** are true and correct copies of Letters from Thomas J. Momjian to Douglas P. Lobel sent on April 17 and 18, 2008 transmitting **spreadsheets with handwritten notes returned by Marcus Hernandez**, in the matter styled *E*TRADE Financial Corporation and E*TRADE Securities LLC v. Marcus J. Hernandez, Sean J. Gaffey, and Banc of America Investment Services, Inc.*, No. 08-cv-2993 (RJH), in the United States District Court for the Southern District of New York.

11. Attached to this declaration as **Exhibit 8** is a true and correct copy of **FINRA Rule 13210. Ex Parte Communications** found at FINRA's websites:

http://finra.complinet.com/finra/display/display.html?rbid=1189&record_id=1159007753&element_id=1159006815&highlight=13210#r1159007753.

12. Attached to this declaration as **Exhibit 9** is a true and correct copy of **FINRA Rule 13313. Multiple Respondents** found at FINRA's website:

http://finra.complinet.com/finra/display/display.html?rbid=1189&record_id=1159007771&element_id=1159006833&highlight=13313#r1159007771.

13. Attached to this declaration as **Exhibit 10** is a true and correct copy of **FINRA Rule 13207. Extension of Deadlines** found at FINRA's website:

http://finra.complinet.com/finra/display/display.html?rbid=1189&record_id=1159007759&element_id=1159006821&highlight=13207#r1159007759.

14. Attached to this declaration as **Exhibit 11** is a true and correct copy of the **Preliminary Injunction Hearing Transcript** (relevant excerpts attached), heard on April 16, 2008, in the matter styled *E*TRADE Financial Corporation and E*TRADE Securities LLC v. Marcus J. Hernandez, Sean J. Gaffey, and Banc of America Investment Services, Inc.*, No. 08-cv-2993 (RJH), in the United States District Court for the Southern District of New York.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 24th day of April, 2008, in Reston, Virginia.

/s/ Douglas P. Lobel
Douglas P. Lobel

CERTIFICATE OF SERVICE

I, Douglas P. Lobel, hereby certify that on the 24th day of April, 2008, Declaration Of Douglas P. Lobel In Support Of E*TRADE's Response To Defendants' Order To Show Cause was filed through the ECF system and will be sent electronically, via the ECF system, to the following registered participants, as also identified on the Notice of Electronic Filing (NEF). There are no non-registered participants in this case to my knowledge and belief.

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/s/ Douglas P. Lobel
Douglas P. Lobel

EXHIBIT 1



Douglas P. Lobel

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March 24, 2008

Director of Arbitration
FINRA Dispute Resolution
One Liberty Plaza
165 Broadway, 27th Floor
New York, New York 10006

Re: STATEMENT OF CLAIM

E*TRADE Securities LLC v. Marcus J. Hernandez; Joseph S. Reilly;
Sean J. Gaffey; and Banc of America Investment Services, Inc.

To the Director of Arbitration:

E*TRADE Securities LLC ("E*TRADE") files this Statement of Claim to obtain permanent injunctive relief, and to recover damages, resulting from (1) the theft of confidential customer information; (2) the unlawful solicitation of customers using that information; and (3) the use of false and defamatory scare tactics to coerce clients to transfer their accounts from E*TRADE.

Respondents Marcus J. Hernandez ("Hernandez"), Joseph S. Reilly ("Reilly"), and Sean J. Gaffey ("Gaffey") are former E*TRADE financial advisors who are now employed by Banc of America Investment Services, Inc. ("BOA"). Jointly, they engaged in a campaign to smear E*TRADE and create panic among its customers using E*TRADE's confidential customer information. Respondents used illegal and unethical means to gain a competitive advantage over E*TRADE in breach of their employment agreements and in violation of federal and state law.

All parties are FINRA Members or Associated Persons, and thus arbitration is required under Rule 13200, FINRA Code of Arbitration Procedure for Industry Disputes (hereafter "FINRA Rule").



I. THE PARTIES

E*TRADE is a Delaware limited liability company whose parent is E*TRADE Financial Corporation, a publicly traded company. All employees of E*TRADE are subject to the policies of the parent company. E*TRADE provides a full range of nationwide retail and institutional brokerage services, including online brokerage services and investment counseling services.

E*TRADE is registered with FINRA, CRD No. 29106.

Hernandez is a former E*TRADE Financial Advisor and is currently employed by BOA. He is registered with FINRA, CRD No. 4218478.

Reilly is a former E*TRADE Financial Advisor and is currently employed by BOA. He is registered with FINRA, CRD No. 3115010.

Gaffey is a former E*TRADE Financial Advisor and is currently employed by BOA. He is registered with FINRA, CRD No. 4284044.

BOA is a Florida corporation with its principal place of business in Boston, Massachusetts. BOA provides financial services nationally and competes directly with E*TRADE's brokerage and investment counseling services. BOA is registered with FINRA, CRD No. 16361.

II. RELEVANT FACTS

A. E*TRADE's Confidential Information

E*TRADE's proprietary customer information and trade secrets (hereafter called "Confidential Information") are critical to its business operations. This information includes E*TRADE's customer and prospect lists; customer account and personal financial information; and internal strategic business, marketing, and financial information and plans.



To cultivate and maintain its customers, E*TRADE engages in extensive and costly advertising campaigns in various media. As a direct result of E*TRADE's significant expenditures, it has developed extensive customer lists that contain detailed financial information about its most profitable customers.

E*TRADE's Confidential Information also contains extensive detail about its internal business plans and practices. This Confidential Information, including the customer list, is not disseminated outside E*TRADE and is not available (by lawful means) to non-E*TRADE persons or entities.

E*TRADE takes substantial precautions to protect the secrecy of its Confidential Information. For example, E*TRADE maintains a proprietary computer network where the Confidential Information is secured by password-protected access and active system checks to prevent unauthorized access. E*TRADE limits access to those employees having a "need to know" and requires these employees to sign agreements protecting the confidentiality of the Confidential Information. E*TRADE also maintains a written Code of Professional Conduct, which contains extensive restrictions on employees' use of E*TRADE's Confidential Information.

B. Respondents All Worked Together In E*TRADE's New York Office

E*TRADE's business model is different from many "full service" brokerage firms, where normally financial advisors have a "book" of business, and they are expected to recruit or solicit new customers. Instead, E*TRADE typically obtains its customers through its marketing efforts and cross-selling from its other business lines; the financial advisors are not expected to recruit customers, and the customers are not considered the financial advisor's customers. E*TRADE assigns a financial advisor to a customer, providing that customer with a point of contact at the



company. However, E*TRADE can, and does, reassign customers to financial advisors from time to time.

The three individual Respondents worked together as financial advisors for years in E*TRADE's New York office. Hernandez started working at E*TRADE in October 2003; Reilly in December 2003; and Gaffey in October 2004. They worked together closely until May 2006, when Reilly relocated to an E*TRADE office in California. Hernandez and Gaffey remained together in New York until November 2007, when Hernandez moved to E*TRADE's office in Blue Bell, Pennsylvania.

As financial advisors, Hernandez, Reilly and Gaffey all provided personalized investment strategies and advice to E*TRADE customers.

C. **E*TRADE Restricted Their Use Of E*TRADE's Confidential Information**

Hernandez, Reilly and Gaffey all had access to, and regularly used, E*TRADE's Confidential Information in the course of their work for E*TRADE. All three Respondents were subject to E*TRADE's restrictions on the use of that information. Hernandez entered into the "Employment Agreement, Proprietary Information and Inventions and Arbitration of Employment Disputes" with E*TRADE on October 7, 2003. (Exhibit 1). Reilly entered into the "Agreement Regarding Employment and Proprietary Information and Inventions" with E*TRADE on January 5, 2004. (Exhibit 2). Gaffey entered into the "Agreement Regarding Employment and Proprietary Information and Inventions" with E*TRADE on October 26, 2004. (Exhibit 3). E*TRADE will refer to these three contracts as the "Employment Agreements."

In addition to agreeing to the specific terms listed in the Employment Agreement, Hernandez, Reilly, and Gaffey all expressly agreed, through their Employment Agreements and



in separately executed statements, that they had read and would comply with E*TRADE's Code of Professional Conduct. (Exhibit 4).

The Employment Agreements expressly, and by incorporation of E*TRADE's Code of Professional Conduct, imposed numerous obligations on Hernandez, Reilly, and Gaffey to protect E*TRADE's Confidential Information, and prohibited them from using it inconsistently with E*TRADE's interests.

1. Respondents' Employment Agreements

All three Employment Agreements contained express restrictions on Respondents' access to and use of E*TRADE's Confidential Information. E*TRADE describes Hernandez's Employment Agreement below. *See Exhibit 1.* The other two Employment Agreements contain essentially identical provisions. *See Exhibits 2 & 3.*

First, Hernandez expressly acknowledged that he understood "that [E*TRADE] possesses and will possess Proprietary Information which is important to its business." Proprietary Information is "information that was developed, created, or discovered by or on behalf of [E*TRADE], . . . which has commercial value in [E*TRADE's] business." This definition includes, but is not limited to, customer lists and other information that concern E*TRADE's actual or anticipated business (customer lists are types of E*TRADE proprietary information).

Exhibit 1, Paragraph A.2.

Hernandez expressly agreed not to remove any Company Documents and Materials from E*TRADE:

All Company Documents and Materials are and shall be the sole property of the Company. *I agree that during my employment by the Company, I will not remove any Company Documents and Materials from the business premises of the Company or deliver any Company*



Documents and Materials to any person or entity outside the Company (Emphasis added.)

Exhibit 1, Paragraph C. In the same provision, Hernandez expressly agreed to return all Company Documents and Materials to E*TRADE upon termination of his employment:

I further agree that, immediately upon the termination of my employment by me or by the Company for any reason, or during my employment if so requested by the Company, I will return all Company Documents and Materials, apparatus, equipment and other physical property, or any reproduction of such property

These same restrictions appear in Reilly's (Exhibit 2, Paragraph C) and Gaffey's (Exhibit 3, Paragraph D) agreements.

2. Gaffey's Non-Solicitation Agreement

In addition, Gaffey's agreement prohibited him from soliciting E*TRADE's customers for two years after termination of this employment – a “non-solicitation” provision:

During the term of my employment and for two (2) years thereafter, *I will not, on behalf of myself or anyone else, directly or indirectly encourage or solicit or attempt to encourage or solicit any customers, clients, partners or affiliates of [E*TRADE] to terminate or diminish their relationship with [E*TRADE]*. I understand that I have an obligation not to use any customer lists or information from customer lists (which are included in the definition of Proprietary Information above) to directly or indirectly solicit business from any [E*TRADE] customer, whether for myself or anyone else.

Exhibit 3, Paragraph H (emphasis added).

3. E*TRADE's Code of Professional Conduct

In addition to the express provisions of the Employment Agreements, each Respondent agreed to abide by additional restrictions described in E*TRADE's Code of Professional Conduct (the “Code”). Relevant portions of the Code are attached as Exhibit 5.



The Code was part of the terms and conditions of Respondents' terms of employment.

See Code, p. 4 ("The policies and procedures of the Code form part of the terms and conditions of your employment"). When they were hired, each individual Respondent signed a written statement acknowledging that he had reviewed the Code and agreed to comply with its terms. Additional acknowledgements were signed as the Code was updated. *See* Exhibit 4.

The Code forcefully requires employees to maintain the confidentiality of E*TRADE's proprietary information. That information expressly includes customer lists. *See* Code, pp. 24, 33. The Code bluntly states, "**E*TRADE FINANCIAL employees are required *as a term of their employment* to agree to maintain the confidentiality of sensitive nonpublic customer . . . information.**" *Id.*, p. 14 (emphasis added). The Code also expressly forbids employees for using E*TRADE's Confidential Information for any purposes other than company business:

In general, you must use E*TRADE FINANCIAL's assets *solely for the benefit of E*TRADE FINANCIAL or its customers.*

....

Any systems to which you are provided access are to be used for Company business purposes. You must adhere to all Company policies and any policies that your business unit or department may set governing such usage. Generally, you should use E*TRADE FINANCIAL's systems only for Company business. You may use the systems for limited personal use in accordance with E*TRADE FINANCIAL policies governing communications and conduct generally. However, *any use for personal profit or contrary to law or Company policies is prohibited.*

....

*Use proprietary or confidential information *solely to perform your duties for E*TRADE FINANCIAL and not for your own personal benefit.**

Id. pp. 24, 24-25 & 35 (emphases added).



The Code also repeatedly requires employees not to remove E*TRADE's Confidential Information from E*TRADE's premises, nor to disclose it to third parties:

Do not remove proprietary or confidential information from Company premises unless absolutely necessary. . . . If you take such information out of the office for business purposes, keep it on your person or in a secure place at all times and return it promptly to Company premises.

Do not disclose proprietary or confidential information to any person outside E*TRADE FINANCIAL (including family members), or use it or permit any third party to use it without first obtaining Legal and Compliance approval.

Id. pp. 36, 37.

Finally, the Code explains that these restrictions continue *after termination of employment:*

You must continue after the end of your employment to abide by E*TRADE FINANCIAL's policies concerning the handling of proprietary and confidential information, the treatment of inside information and the handling of privileged materials, as outlined in this Code and in any specific policies of your business unit or department. If you have downloaded such information onto any personal computer equipment, including a personal digital assistant, you are required to delete that information permanently from the equipment.

You may not disclose proprietary or confidential information of E*TRADE FINANCIAL or any third party outside of the Company at any time, including after termination of employment. You may not take such proprietary or confidential information when leaving E*TRADE FINANCIAL or use or disclose such information for your own personal benefit or for the benefit of your new employer or prospective new employer. You may not permit its disclosure or use by any third party.

Id. at 27, 38.



D. Hernandez, Reilly, And Gaffey Breach Their Employment Agreements

In clear coordination, the three individual Respondents all abruptly resigned from E*TRADE within a short time early this year. All three of them immediately went to work for the same employer, Respondent BOA. All three of them took E*TRADE's customer lists, and then all three of them immediately began inundating E*TRADE's customers on those lists with solicitations to transfer their E*TRADE accounts to BOA. All three of them induced fear in E*TRADE's customers by making false statements about E*TRADE's solvency and the security of customers' deposits. These events are hardly a coincidence.

- Hernandez left first. On January 18, 2008, Hernandez abruptly resigned from E*TRADE without warning and effective immediately. (Exhibit 6). That very same day, Hernandez became an employee of E*TRADE's competitor -- BOA.
- One week later, on January 25, 2008, Reilly abruptly resigned from E*TRADE without warning and effective immediately. (Exhibit 7). Like Hernandez, Reilly also became an employee of BOA the very same day he resigned.
- Shortly thereafter, on February 22, 2008, Gaffey abruptly resigned from E*TRADE without warning and effective immediately. (Exhibit 8). Like Hernandez and Reilly, Gaffey became an employee of BOA on the day he resigned.

None of the three left E*TRADE empty-handed. E*TRADE has evidence -- including "smoking guns" -- that they stole E*TRADE's confidential customer lists and used them at BOA to steal E*TRADE's customers.

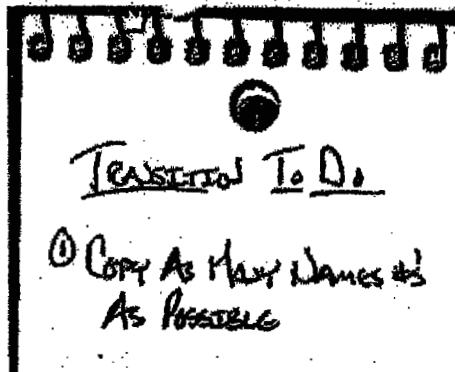
Hernandez. After Hernandez resigned, E*TRADE contacted customers whom Hernandez had previously serviced. Many of them reported to E*TRADE that Hernandez had contacted them to solicit their business for BOA. When E*TRADE checked its records, it discovered that Hernandez *had forwarded to his home email* a series of computer files from E*TRADE's computer systems. These files included:



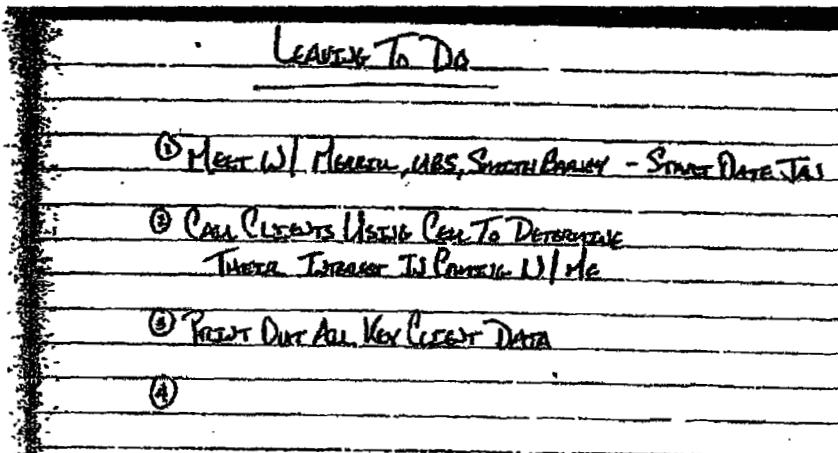
- A client list containing personal information for 257 E*TRADE clients, including their names, addresses, telephone numbers, and account numbers.
- For 2006, a monthly and quarterly breakdown of the gross monetary production report for all E*TRADE financial advisors, including a detailed breakdown of how much each financial advisor sold of each type of financial product (such as mutual funds, CDs, and bonds).
- For 2003-2006, a monthly breakdown of sales transactions categorized by date of transaction, type of investment sold, buy/sell information, and account information, including monthly summaries regarding gross/net sales figures.
- A spreadsheet called Bond Clients which appears to contain account numbers and other information regarding E*TRADE clients for other E*TRADE financial advisors.

(Exhibit 9). These confidential files enabled Hernandez to contact E*TRADE customers and solicit them to transfer their accounts to BOA.

Reilly. The evidence against Reilly is just as damning. Reilly left E*TRADE's offices so abruptly that he forgot to clean up his work papers. Among his working files were notebooks in his own handwriting. In these notebooks, he described that he *copied E*TRADE customer lists and customer data*. He also described how he called these customers to solicit them to transfer their accounts to BOA *while still employed at E*TRADE*, using his cell phone to evade detection. Reilly's own words and handwriting speak for themselves:



"Transition To Do[:] Copy As Many Names #'s As Possible"



"Leaving To Do"

(2) Call Clients Using Cell To Determine Their Interest In Coming w/ Me
(3) Print Out All Key Client Data"

These documents are attached as Exhibit 10.

E*TRADE determined that Reilly did exactly what his notes describe. E*TRADE contacted numerous other customers after Reilly left, who stated that Reilly called them and solicited them to transfer their accounts to BOA.

Gaffey. Gaffey engaged in exactly the same behavior. While he was careful not to leave direct evidence that he stole E*TRADE's Confidential Information, his behavior left its own trail. Again, E*TRADE contacted customers after Gaffey left and discovered that -- despite his non-solicitation agreement -- Gaffey was calling E*TRADE customers to solicit them to transfer



their accounts to BOA. In these calls, Gaffey used account-specific customer information, proving that he took not just confidential customer contact information, but also proprietary account details with him.

These activities breached the express restrictions in their respective Employment Agreements, as well as the Professional Code of Conduct which they agreed to obey.

E. Respondents' Defamation of E*TRADE To Customers

Respondents did not merely steal customer information to call the customers. They also engaged in a campaign of scare tactics to coerce customers to transfer their business from E*TRADE to BOA.

As discussed above, customers open E*TRADE accounts because they wish to utilize E*TRADE's services; customers are generated by E*TRADE, not by the financial advisors. Respondents service the accounts once the firm generates them, but the customers are E*TRADE's customers. Thus, when the individual Respondents left E*TRADE, it was far from certain that any of the customers would follow them to BOA.

Consequently, the individual Respondents knew they needed leverage to persuade E*TRADE's customers to leave E*TRADE for BOA. As a result, they engaged in a coordinated campaign of fear, telling E*TRADE's customers that E*TRADE was possibly insolvent. Worse, they outright lied to the customers by claiming that, in the event of insolvency, their assets were at risk. Respondents knew this was false because E*TRADE has multiple layers of insurance to protect their customers' assets. However, Respondents misrepresented the safety of customer accounts because they needed to create anxiety in these customers to pry them away from E*TRADE.



F. Respondents' Damage To E*TRADE's Business

Unfortunately, Respondents' illegal and unethical conduct was successful in siphoning off certain high-worth customers from E*TRADE to BOA. E*TRADE contacted some of these customers and determined that they had been solicited and scared away from E*TRADE by Respondents' defamatory claims about E*TRADE's solvency and the security of the customers' assets. E*TRADE has likely lost many of these customers for good, despite concerted efforts to woo them back.

Other customers whom Respondents contacted remain at E*TRADE, but their loyalty has been shaken. Some have lost confidence and trust in E*TRADE; some were distressed that non-E*TRADE personnel possessed personal financial information about their E*TRADE accounts; some were alarmed by what they viewed as a breach of security; and others had their confidence in E*TRADE shaken by the scare tactics and fear-mongering about solvency and protection of assets. These concerns have caused, and will continue to cause, loss of business, either by making these customers more likely to leave E*TRADE in the future, or by causing them to do less business with E*TRADE.

III. E*TRADE'S CLAIMS AGAINST RESPONDENTS

Respondents' unlawful conduct gives rise to numerous claims under federal and state statutes and common law, and FINRA Rules.

I. Breach Of Contract. Hernandez, Reilly and Gaffey all materially breached their Employment Agreements with E*TRADE. In violation of various provisions of those Agreements, as well as the requirements in the Code of Professional Conduct, they:



- Disclosed Confidential Information outside of E*TRADE;
- Used Confidential Information for personal benefit and to compete with E*TRADE;
- Removed Confidential Information from E*TRADE's premises while employed at E*TRADE, and did not destroy or return it after termination of employment;
- Used and disclosed Confidential Information after the termination of their employment at E*TRADE; and
- Removed and used E*TRADE's corporate property, including E*TRADE's business information, files, client lists, and e-mail, after the termination of their employment at E*TRADE.

Gaffey also breached his contractual obligations not to solicit E*TRADE's customers for two years after leaving E*TRADE. E*TRADE is entitled to be compensated for Respondents' breaches of their Agreements.

2. Breach Of Fiduciary Duty Of Loyalty. The law imposes on financial advisors a "fiduciary duty" (meaning, a special duty of care requiring strict compliance) not to take actions during their employment contrary to the interests of their employer. Sometimes this is called a "duty of loyalty." The duty exists even if it is not expressly written in a contract; it is imposed by law from the nature of the relationship. Hernandez, Reilly and Gaffey breached their duty of loyalty to E*TRADE by stealing E*TRADE's proprietary information in order to poach its customers, and by soliciting E*TRADE's customers *while* they were employed at E*TRADE.

3. Misappropriation Of Trade Secrets. E*TRADE has a valid, enforceable right to protect the secrecy of internal business information it develops and holds in confidence. There is no question that E*TRADE's customer lists and the customer account information constitutes "trade secrets" – E*TRADE expended enormous resources to develop this information and to protect it from misuse by competitors like BOA. There is also no question that all four



Respondents willfully and maliciously misappropriated E*TRADE's trade secrets. The three individual Respondents, acting on their own behalf and as agents of BOA, took the information from E*TRADE and used it while employed at BOA to benefit themselves and BOA. All four Respondents are liable to E*TRADE for this misappropriation of E*TRADE's trade secrets, for not only damages, but for attorneys' fees under state law.

4. *Conversion.* "Conversion" is the common-law cause of action for, simply, theft. Respondents stole E*TRADE's property. Without authorization, they took E*TRADE's Confidential Information and used it contrary to E*TRADE's interest. In particular, E*TRADE had a protectable interest in the secrecy of its Confidential Information. Respondents destroyed the value of this secrecy by taking the information and using it for their own benefit.

5. *Defamation (Sometimes Called "Libel" (For Written Statements) And "Slander" (For Spoken Statements)).* Respondents defamed E*TRADE by lying to customers about E*TRADE's financial solvency and the security of its customers' deposits. Respondents knew that they were making statements to customers that were false, such as that E*TRADE's bankruptcy was imminent (obviously, it was not) and that customers' assets would be lost if E*TRADE were to go bankrupt (which was entirely false because customers' accounts were always fully insured). Respondents spread these false statements to benefit BOA and to harm E*TRADE. BOA is responsible for its employees' actions. E*TRADE is entitled to be compensated for the loss of business that resulted from these false statements.

6. *Unfair Competition.* BOA and its employees are not allowed to achieve an "unfair" advantage over competitors like E*TRADE. Respondents cannot steal property, breach contracts, or spread false statements about E*TRADE in order to compete illegally for the business of E*TRADE's customers. E*TRADE is entitled to be compensated for the loss of



business (and/or the gain of business by BOA) resulting from the unfair methods that Respondents employed.

7. *Tortious Interference With Prospective Advantage.* Respondents are liable for interfering with E*TRADE's profitable relationships with its customers. E*TRADE expected to enjoy profitable relationships with its customers, with which Respondents interfered by causing the customers to leave E*TRADE. While free and fair competition is entirely permitted, the law prohibits Respondents from using "wrongful" or improper acts to impair E*TRADE's relationships with its customers – such as by stealing E*TRADE's Confidential Information or scaring customers to leave E*TRADE using false statements. Under a cause of action known as "tortious interference with prospective advantage," Respondents are liable to E*TRADE for the loss of business that E*TRADE suffered for Respondents' actions.

8. *Violation Of The Computer Fraud And Abuse Act, 18 U.S.C. § 1030 ("CFAA").* The CFAA is a federal law that criminalizes unauthorized access to computer systems for the purpose of stealing information. Congress amended the law a few years ago to permit private persons or companies, injured by unauthorized access to their computers, to sue for damages. The three individual Respondents, on their own behalf and as agents of BOA, violated CFAA by accessing E*TRADE's Confidential Information through E*TRADE's computer systems without authorization, or in excess of the authorization E*TRADE gave them. Respondents then used this information to perpetrate "fraud" on E*TRADE -- which means, basically, an improper scheme to deprive E*TRADE of something valuable, like E*TRADE's Confidential Information and its relationships with its customers. Thus, Respondents are liable to E*TRADE under the provisions of the CFAA.



9. *Violation Of Standards Of Commercial Honor And Principles Of Trade, NASD Conduct Rule 2210.*

Conduct Rule 2210. Finally, NASD Conduct Rule 2210 requires that members (and associated persons) “observe high standards of commercial honor and just and equitable principles of trade.” Stealing customer lists and terrorizing the public about the safety of its assets is the furthest thing from the conduct the NASD/FINRA demands through this Rule. Respondents are liable to E*TRADE for violating this fundamental principal in the securities industry.

IV. E*TRADE HAS SOUGHT PRELIMINARY INJUNCTIVE RELIEF FROM FEDERAL COURT

As permitted under FINRA Rule 13804(a)(1), concurrent with the filing of this Statement of Claim, E*TRADE has sued Respondents in federal court, solely seeking preliminary injunctions to prohibit Respondents’ misuse of E*TRADE’s Confidential Information while this arbitration is pending: *E*TRADE Financial Corp., et al. v. Reilly and BOA* (C.D. Cal.) and *E*TRADE Financial Corp., et al. v. Hernandez, Gaffey and BOA* (S.D.N.Y.).

V. RELIEF REQUESTED

Through this Statement of Claim, Claimants seek:

1. ***Expedited Arbitration Hearing:*** An expedited arbitration hearing seeking a permanent injunction, to be held within 15 days of the issuance by a court of a preliminary injunction, pursuant to FINRA Rule 13804(b)(1);
2. ***Permanent Injunction:*** A permanent injunction barring all four Respondents from:
 - a. Soliciting the business of an E*TRADE customer whom Respondents serviced, or whose name became known to Respondents through E*TRADE’s records;
 - b. Using, disclosing or transmitting for any purpose, including the solicitation of business, the information contained in the records of E*TRADE, including but not limited to, the names, addresses, financial



information, investment objectives and account information of any E*TRADE's customer;

- c. Publishing or speaking false and/or misleading information about E*TRADE; and
- d. Aiding, abetting, or encouraging any other persons or entities to do any of the aforementioned acts;

3. ***Separate Damages Hearing:*** Compensatory damages in an amount to be determined at a subsequently scheduled hearing, pursuant to FINRA Rule 13804(c);
4. Punitive damages in an amount to be determined at the damages hearing;
5. Award of all costs of arbitration, including forum fees;
6. ***Attorneys' Fees:*** Reasonable attorneys' fees and costs pursuant to the Panel's equitable power arising from Respondents' egregious conduct in breaching their Agreements, engaging in unfair competition, and in manipulating the fears of the public for their own benefit; and

7. All other relief the Panel deems appropriate.

Sincerely,

A handwritten signature in black ink, appearing to read "D. P. Lobel".

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*Counsel for E*TRADE Securities LLC*

357869 v1/RE

EXHIBIT 2

Compilation of Instant Message Logs for Marcus Hernandez, Scott Reilly and Sean Gaffey

Sender Name	Sender IM	Recipient Name	Recipient IM	Message Date	Content	Host Name
Reilly, Scott	scott.reilly@im.corp.etradegrp.com	Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	12/4/2007 18:42	call my cell later	dca1vmexim1.corp.etradegrp.com
Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	Reilly, Scott	scott.reilly@im.corp.etradegrp.com	12/4/2007 18:42	done deal	atl1vmexim1.corp.etradegrp.com
Reilly, Scott	scott.reilly@im.corp.etradegrp.com	Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	12/4/2007 21:35	we need to talk about the non-compe	dca1vmexim1.corp.etradegrp.com
Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	Reilly, Scott	scott.reilly@im.corp.etradegrp.com	12/4/2007 21:35	definitely	atl1vmexim1.corp.etradegrp.com
Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	Reilly, Scott	scott.reilly@im.corp.etradegrp.com	12/4/2007 21:35	call me	atl1vmexim1.corp.etradegrp.com

Sender Name	Sender IM	Recipient Name	Recipient IM	Message Date	Content	Host Name
Reilly, Scott	scott.reilly@im.corp.etradegrp.com	Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	1/8/2008 21:49	got to be an exodus soon	atl1vmexim1.corp.etradegrp.com
Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	Reilly, Scott	scott.reilly@im.corp.etradegrp.com	1/8/2008 21:50	i honestly would be very upset to leave this place	atl1vmexim1.corp.etradegrp.com
Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	Reilly, Scott	scott.reilly@im.corp.etradegrp.com	1/8/2008 21:50	as sad and soft as it seems	atl1vmexim1.corp.etradegrp.com
Reilly, Scott	scott.reilly@im.corp.etradegrp.com	Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	1/8/2008 21:50	of course, me too	atl1vmexim1.corp.etradegrp.com
Reilly, Scott	scott.reilly@im.corp.etradegrp.com	Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	1/8/2008 21:50	was a great start for us	atl1vmexim1.corp.etradegrp.com
Reilly, Scott	scott.reilly@im.corp.etradegrp.com	Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	1/8/2008 21:50	time to parlay it before we go bk	atl1vmexim1.corp.etradegrp.com
Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	Reilly, Scott	scott.reilly@im.corp.etradegrp.com	1/8/2008 21:50	if things go our way it can work out perfectly actually	atl1vmexim1.corp.etradegrp.com

Sender Name	Sender IM	Recipient Name	Recipient IM	Message Date	Content	Host Name
Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	Reilly, Scott	scott.reilly@im.corp.etradegrp.com	1/9/2008 21:17	my guy emailed me	atl1vmexim1.corp.etradegrp.com
Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	Reilly, Scott	scott.reilly@im.corp.etradegrp.com	1/9/2008 21:17	hsa a different guy for you to call	atl1vmexim1.corp.etradegrp.com
Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	Reilly, Scott	scott.reilly@im.corp.etradegrp.com	1/9/2008 21:17	his boy in newport	atl1vmexim1.corp.etradegrp.com
Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	Reilly, Scott	scott.reilly@im.corp.etradegrp.com	1/9/2008 21:21	call that guy now	atl1vmexim1.corp.etradegrp.com

Compilation of Instant Message Logs for Marcus Hernandez, Scott Reilly and Sean Gaffey

Sender Name	Sender IM	Recipient Name	Recipient IM	Message Date	Content	Host Name
Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	1/8/2008 17:08	i wonder how much time we have	atl1vmexim2.corp.etradegrp.com
Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	1/8/2008 17:10	I've never been really sacred before	atl1vmexim1.corp.etradegrp.com
Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	1/8/2008 17:10	like sick to my stomach scared	atl1vmexim1.corp.etradegrp.com
Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	1/8/2008 17:10	I am now	atl1vmexim1.corp.etradegrp.com
Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	1/8/2008 17:10	i dont know how to handle it	atl1vmexim2.corp.etradegrp.com
Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	1/8/2008 17:10	I'm all f'ed up	atl1vmexim1.corp.etradegrp.com

Sender Name	Sender IM	Recipient Name	Recipient IM	Message Date	Content	Host Name
Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	1/8/2008 17:26	hook me up	atl1vmexim1.corp.etradegrp.com
Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	1/8/2008 17:26	i did	atl1vmexim2.corp.etradegrp.com
Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	1/8/2008 17:26	i have the contact	atl1vmexim2.corp.etradegrp.com
Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	1/8/2008 17:31	sent	atl1vmexim2.corp.etradegrp.com
Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	1/8/2008 17:54	text	atl1vmexim2.corp.etradegrp.com
Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	1/8/2008 17:54	got it	atl1vmexim1.corp.etradegrp.com
Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	1/8/2008 17:54	wonder if that would be a better option than NJ?	atl1vmexim1.corp.etradegrp.com
Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	1/8/2008 17:54	the other i owe you tonnight	atl1vmexim2.corp.etradegrp.com
Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	1/8/2008 17:54	not sure	atl1vmexim2.corp.etradegrp.com
Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	1/8/2008 17:55	this guy said that guy is one of the top guys	atl1vmexim2.corp.etradegrp.com
Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	1/8/2008 17:56	text me that guys name so I can reference him	atl1vmexim1.corp.etradegrp.com
Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	1/8/2008 17:58	done	atl1vmexim2.corp.etradegrp.com
Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	1/8/2008 17:58	thx	atl1vmexim1.corp.etradegrp.com
Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	1/8/2008 17:58	i owe you one	atl1vmexim1.corp.etradegrp.com
Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	1/8/2008 17:58	no worries man	atl1vmexim2.corp.etradegrp.com
Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	1/8/2008 17:58	ill get you the other guy	atl1vmexim2.corp.etradegrp.com
Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	1/8/2008 17:58	talked you up a little bit	atl1vmexim2.corp.etradegrp.com
Gaffey, Sean	sean.gaffey@im.corp.etradegrp.com	Hernandez, Marcus	marcus.hernandez@im.corp.etradegrp.com	1/8/2008 17:58	ok, thx	atl1vmexim1.corp.etradegrp.com

EXHIBIT 3

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

**E*TRADE FINANCIAL
CORPORATION and
E*TRADE SECURITIES LLC**

Plaintiffs,

V.

JOSEPH S. REILLY and
BANC OF AMERICA
INVESTMENT SERVICES, INC.

Defendants.

Case No. CV08-1963 AHM (FMOx)

**MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
OF PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION
IN AID OF ARBITRATION**

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1 **I. INTRODUCTION**

2 Plaintiffs E*TRADE Financial Corporation and its wholly owned subsidiary
 3 E*TRADE Securities LLC (jointly “E*TRADE”) move pursuant to Fed. R. Civ. P.
 4 65(a) for a preliminary injunction against Defendant Joseph S. Reilly (“Reilly”) and
 5 his current employer, Banc of America Investment Services, Inc. (“BOA”).

6 Until recently, Reilly was a long-time employee of E*TRADE, subject to an
 7 employment agreement forbidding using or taking proprietary information for
 8 personal use. Before he resigned, he took E*TRADE’s confidential and trade
 9 secret customer information, and then he used this information to solicit
 10 E*TRADE’s customers for BOA, his new employer. Reilly coerced E*TRADE
 11 customers to transfer their accounts using fear tactics, telling them that E*TRADE
 12 was failing and that their assets were at risk.

13 E*TRADE has direct evidence of Reilly and BOA’s theft of E*TRADE’s
 14 trade secrets. Reilly resigned from E*TRADE in such haste that he failed to clean
 15 up his work papers from his office. He left behind two handwritten notes
 16 describing what he needed to accomplish before he left:

17 ***“Copy As Many [Customer] Names [and Numbers] As Possible”***

18 and

19 ***“Call Clients Using Cell To Determine Their Interest In Coming w/ Me”***

20 and

21 ***“Print Out All Key Client Data”***

22 After Reilly resigned from E*TRADE, he used this information to systematically
 23 contact E*TRADE’s customers and solicit their business for BOA, using false
 24 statements to instill fear in E*TRADE’s customers.

25 Reilly’s conduct breached his written employment agreement with
 26 E*TRADE, as well as federal and state laws. While E*TRADE believes it will
 27 clearly prevail on its numerous claims for breach of contract, breach of fiduciary
 28 duty, misappropriation of trade secrets, etc., the merits of E*TRADE’s suit (and

1 E*TRADE's right to a permanent injunction) must be resolved in an arbitration
 2 before the Financial Industry Regulatory Authority ("FINRA"). Concurrent with
 3 filing this lawsuit, E*TRADE filed a Statement of Claim against Defendants at
 4 FINRA. Consequently, in this action E*TRADE only seeks a preliminary
 5 injunction prohibiting Defendants from using E*TRADE's proprietary information
 6 pending the outcome of the arbitration Hearing.

7 Without a preliminary injunction, E*TRADE will continue to suffer
 8 irreparable harm because competitor BOA will continue using E*TRADE's
 9 confidential information to solicit E*TRADE's customers, causing loss of assets
 10 and goodwill. Conversely, an injunction will impose no burdens on Defendants,
 11 who remain free to market their services, but without using the information they
 12 wrongfully took from E*TRADE. Finally, any injunction would be short lived --
 13 industry rules specify that an expedited arbitration at FINRA must begin within 15
 14 days after the Court issues a preliminary injunction.

15 BOA is in no position to disagree. BOA has filed almost 20 substantively
 16 identical lawsuits in the last five years seeking exactly this kind of relief. In these
 17 cases, BOA, like E*TRADE here, sought preliminary injunctions pending FINRA
 18 arbitrations against former employees who allegedly stole BOA's customer
 19 information and trade secrets, then used it to compete with BOA.

20 This Motion is straightforward, and the evidence is clear. The Court should
 21 enter the preliminary injunctive relief requested in E*TRADE's complaint.

22 **II. STATEMENT OF FACTS**

23 E*TRADE is a leading online brokerage firm that also provides financial and
 24 investment counseling services to individual investors. Reilly was a "financial
 25 advisor" who provided investment advice to E*TRADE's customers. In January
 26 2008, he abruptly resigned and immediately started working at BOA. The evidence
 27 proves that he took E*TRADE's proprietary customer information to BOA and has
 28

1 used it to poach E*TRADE's customers. *See generally* Declaration of Curt
 2 Radetich ("Radetich Decl."), ¶¶ 31-44.¹

3 **A. E*TRADE Has Valuable Trade Secrets And Confidential
 4 Information That It Protects Through Extensive Efforts**

5 A critical part of E*TRADE's business is its customer financial information
 6 and trade secrets ("Confidential Information"). This information includes:
 7 E*TRADE's customer prospect lists; customer account and personal financial
 8 information; and internal strategic business, marketing, and financial plans. *Id.*
 9 ¶ 13. To cultivate and maintain its customer base, E*TRADE engages in extensive
 10 and costly advertising in various media. As a direct result of E*TRADE's
 11 marketing efforts, it has developed extensive customer lists that contain detailed
 12 personal financial information about its customers. *Id.* ¶¶ 13-14.

13 E*TRADE vigorously maintains the secrecy of its Confidential Information.
 14 E*TRADE maintains its Confidential Information on its internal, proprietary
 15 E*TRADE computer databases. *Id.* ¶ 16. E*TRADE prohibits non-E*TRADE
 16 individuals from accessing the information. *Id.* All access to the information
 17 requires specific user passwords, and E*TRADE constantly monitors these
 18 networks for unauthorized access. *Id.* E*TRADE instructs its employees not to
 19 release Confidential Information outside of E*TRADE. *Id.* ¶ 17.

20 E*TRADE restricts access to its Confidential Information to those employees
 21 having a "need to know," and it requires these employees to sign agreements
 22 protecting the confidentiality of this information. *Id.* ¶¶ 16-19. Furthermore,
 23 E*TRADE maintains an internal written policy regarding employee access to and
 24 use of E*TRADE's confidential customer and account information, called the
 25 "Code of Professional Conduct." *Id.* ¶ 18 & Ex. 2.

26

27

28 ¹ Exhibits to the Radetich Declaration are cited as "Ex. ____."

When a financial advisor's employment with E*TRADE ends, regardless of the reason, E*TRADE follows certain procedures to secure and guard its Confidential Information. Before leaving the building on the last day of employment, a financial advisor must submit to a reasonable search to verify that he or she is not removing Confidential Information. *Id.* ¶ 20.

E*TRADE's Confidential Information would be extremely valuable to competitors like BOA, and would provide E*TRADE's competitors with an unfair commercial advantage. The Confidential Information reflects each customer's unique situation, financial needs, and account history, so that competitors in possession of the information could solicit E*TRADE's customers using a "sales pitch" specifically tailored to that customer. *Id.* ¶ 15.

B. Reilly Agreed To Protect And Not Misuse E*TRADE's Trade Secrets

As an E*TRADE employee, Reilly had access to E*TRADE's Confidential Information, and thus was subject to procedures and obligations to protect and not misuse it, as described below.

Reilly started working for E*TRADE as a Financial Advisor in December 2003. *Id.* ¶ 22.² Shortly after he started, Reilly and E*TRADE entered into "Agreement Regarding Employment and Proprietary Information and Inventions" (the "Employment Agreement"). *Id.* ¶ 24 & Ex. 4. The Employment Agreement

² Reilly provided personalized investment strategies and advice to E*TRADE customers, but they were **E*TRADE's** customers, not **his** customers. E*TRADE's business model is different from most brokerage firms'. Typically in the large brokerage firms like Merrill Lynch, financial advisors are expected to bring in new customers and then retain the customers as their own personal clients throughout their career at the firm, and the customers traditionally follow the advisors when they change firms. *Id.* ¶ 11. E*TRADE obtains new customers through marketing and cross-selling in its other business lines; the financial advisors **are not** expected to bring in customers. *Id.* E*TRADE assigns each customer a financial advisor so that the customer has a consistent point of contact with E*TRADE. *Id.* ¶ 12. E*TRADE can, and does move customers to different financial advisors. *Id.*

1 expressly, and by incorporation of E*TRADE's Code of Professional Conduct,
 2 imposed numerous obligations on Reilly to protect E*TRADE's Confidential
 3 Information and not to use it against E*TRADE's interests.

4 ***1. The Employment Agreement***

5 The Employment Agreement contained express restrictions on Reilly's
 6 access to and use of E*TRADE's Confidential Information. Reilly expressly
 7 acknowledged that he understood "that [E*TRADE] possesses and will possess
 8 Proprietary Information which is important to its business." Proprietary
 9 Information is "information that was developed, created, or discovered by or on
 10 behalf of E*TRADE, which has commercial value in E*TRADE's business." This
 11 definition includes, but is not limited to, customer lists and other information that
 12 concern E*TRADE's actual or anticipated business. *Ex. 4, ¶ A.*

13 Reilly expressly agreed not to remove any Company Documents and
 14 Materials from E*TRADE:

15 **I agree that during my employment by the Company,
 16 I will not remove any Company Documents and
 17 Materials from the business premises of the Company
 18 or deliver any Company Documents and Materials to any
 19 person or entity outside the Company**

20 *Ex. 4, ¶ C* (emphasis added). In the same provision, Reilly expressly agreed to
 21 return all Company Documents and Materials to E*TRADE upon termination of his
 22 employment:

23 I further agree that, immediately upon the termination of
 24 my employment by me or by the Company for any
 25 reason, or during my employment if so requested by the
 26 Company, I will return all Company Documents and
 27 Materials, apparatus, equipment and other physical
 28 property, or any reproduction of such property

29 *Id.*

30 ***2. Code Of Professional Conduct***

31 In addition to the express provisions of the Employment Agreement, Reilly
 32 agreed to abide by additional restrictions described in E*TRADE's Code of
 33

1 Professional Conduct (the “Code”). *Id.* ¶ 25 & Ex. 5. The Code was part of the
 2 terms and conditions of Reilly’s terms of employment. *Ex.* 2 at p. 4.

3 The Code forcefully required Reilly to maintain the confidentiality of
 4 E*TRADE’s proprietary information. That information includes customer lists. *Id.*
 5 at 24, 33. The Code bluntly states that E*TRADE’s “employees are required as a
 6 term of their employment to agree to maintain the confidentiality of sensitive
 7 nonpublic customer.” *Id.* at 14. The Code also forbids Reilly from using
 8 E*TRADE’s Confidential Information for any purposes other than company
 9 business:

10 In general, you must use [E*TRADE] assets solely for the
 11 benefit of [E*TRADE] or its customers.

12 * * *

13 Any systems to which you are provided access are to be
 14 used for Company business purposes. You must adhere to
 15 all Company policies and any policies that your business
 16 unit or department may set governing such usage.
 17 Generally, you should use [E*TRADE’s] systems only for
 18 Company business. You may use the systems for limited
 19 personal use in accordance with [E*TRADE] policies
 20 governing communications and conduct generally.
 However, any use for personal profit or contrary to law or
 Company policies is prohibited.

21 * * *

22 Use proprietary or confidential information solely to
 23 perform your duties for [E*TRADE] and not for your
 24 own personal benefit.

25 *Id.* at 24-25 & 35.

26 The Code also requires Reilly not to remove E*TRADE’s Confidential
 27 Information from E*TRADE’s premises, nor to disclose it to third parties:

28 Do not remove proprietary or confidential information
 29 from Company premises unless absolutely necessary. . . .
 If you take such information out of the office for business
 30 purposes, keep it on your person or in a secure place at all
 31 times and return it promptly to Company premises.

32 Do not disclose proprietary or confidential information to
 33 any person outside [E*TRADE] (including family

members), or use it or permit any third party to use it without first obtaining Legal and Compliance approval.

Id. at 36, 37.

Finally, the Code explains that these restrictions continue *after Reilly's employment terminates*:

You must continue after the end of your employment to abide by [E*TRADE's] policies concerning the handling of proprietary and confidential information, the treatment of inside information and the handling of privileged materials, as outlined in this Code and in any specific policies of your business unit or department. If you have downloaded such information onto any personal computer equipment, including a personal digital assistant, you are required to delete that information permanently from the equipment.

You may not disclose proprietary or confidential information of [E*TRADE] or any third party outside of [E*TRADE] at any time, including after termination of employment. You may not take such proprietary or confidential information when leaving [E*TRADE] or use or disclose such information for your own personal benefit or for the benefit of your new employer or prospective new employer. You may not permit its disclosure or use by any third party.

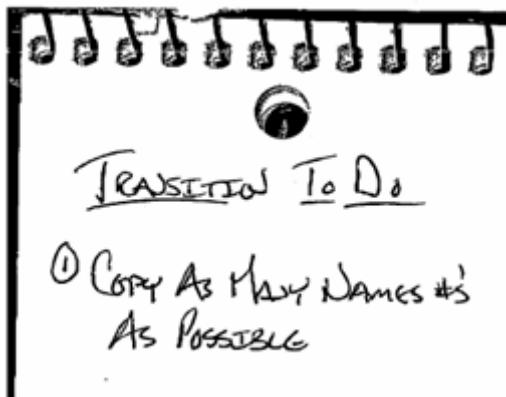
Id. at 27, 38.

C. Reilly Took E*TRADE's Confidential Information And Used It To Solicit Customers For BOA

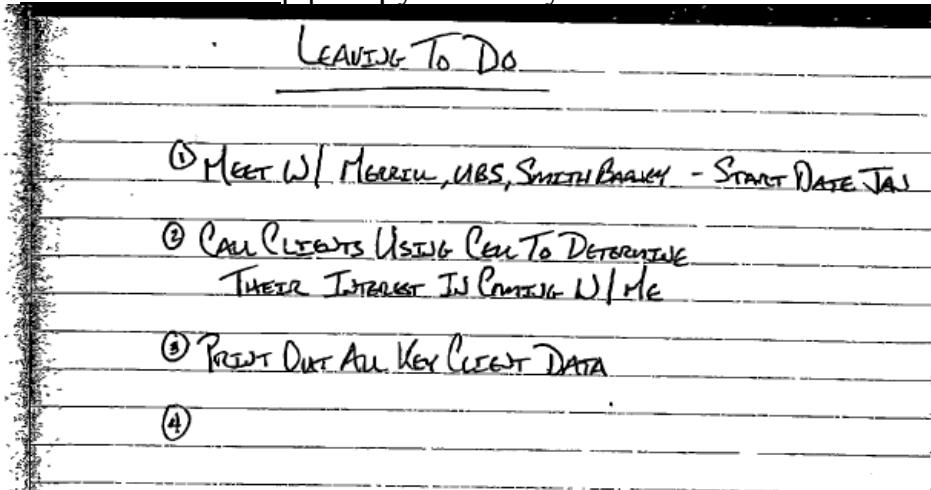
On January 25, 2008, Reilly resigned from E*TRADE without warning, effective immediately. Radetich Decl. ¶ 28. That same day, Reilly became a BOA employee. *Id.* ¶ 37.

In his haste to leave, he left behind direct evidence of his violations of the Employment Agreement and the Code. Reilly left E*TRADE's offices so abruptly that he failed to remove his work papers. Among his work files were notebooks in his own handwriting. In these notebooks, he stated that he had *copied E*TRADE customer lists and customer data* so that he could use this Confidential Information to solicit E*TRADE's customers to transfer their accounts to BOA. He also described how he solicited these customers for BOA *while still employed at*

1 **E*TRADE**, using his cell phone to evade detection. Reilly's own words and
2 handwriting speak for themselves:



10 “Transition To Do[:] Copy As Many Names #'s' As Possible”



Leaving To Do

(2) Call Clients Using Cell To Determine Their Interest In Coming w/ Me
(3) Print Out All Key Client Data”

20 || *Id.* ¶¶ 32-33 & Exs. 7, 8.

21 Other evidence proves that Reilly did exactly what his notes describe.

22 Numerous E*TRADE customers stated that Reilly called them after he resigned,
23 and solicited them to transfer their accounts to BOA. *Id.* ¶¶ 36-37, 41-43.

24 BOA directly benefited from Reilly's wrongful conduct because some
25 E*TRADE customers whom Reilly solicited transferred their accounts to BOA.
26 BOA obtained relationships with prospective customers at E*TRADE's expense.
27 Because Reilly knew he was going to be a BOA employee and he was soliciting

1 business for BOA, he acted as BOA's agent and all of his conduct is directly
 2 attributable to BOA as well.

3 **D. Reilly Intentionally Misrepresented E*TRADE's Financial
 4 Viability And The Safety Of E*TRADE's Customer Accounts To
 Steal Those Customers For BOA**

5 Reilly did not merely steal Confidential Information to solicit E*TRADE's
 6 customers; he also coerced customers to transfer their accounts by instilling fears
 7 about the safety of their assets.

8 As discussed above, customers open E*TRADE accounts because they wish
 9 to utilize E*TRADE's services; customers are generated by E*TRADE, not by the
 10 financial advisors. Financial advisors service the accounts once the firm generates
 11 them, but the customers are E*TRADE's customers. Thus, when Reilly left
 12 E*TRADE, it was far from certain that any E*TRADE customer would follow him
 13 to BOA. Radetich Decl., ¶ 11.

14 Consequently, Reilly knew he needed leverage to persuade E*TRADE's
 15 customers to leave E*TRADE for BOA. As a result, he engaged in a coordinated
 16 campaign of fear, telling E*TRADE's customers that E*TRADE was possibly
 17 insolvent. Worse, he outright lied to customers by claiming that, in the event of
 18 insolvency, their assets were at risk. Reilly knew this was false because E*TRADE
 19 has multiple layers of insurance to protect its customers' assets. However, Reilly
 20 misrepresented the safety of customer accounts because he needed to create anxiety
 21 in these customers to pry them away from E*TRADE. *Id.* at ¶¶ 38, 41-42.

22 After joining BOA, Reilly called numerous E*TRADE customers and tried
 23 to scare them into transferring their accounts to BOA. For example, Reilly called
 24 E*TRADE customer Max W. (with whom he had not spoken in almost two years)
 25 and told this customer that he should transfer his accounts to BOA because
 26 E*TRADE was a "sinking ship." Reilly told E*TRADE customer Dan J. that he
 27 should transfer his accounts to E*TRADE because E*TRADE was having financial
 28 problems. *Id.* ¶¶ 41-42.

1 **E. E*TRADE Will Continue To Suffer Irreparable
2 Harm If Defendants' Wrongful Conduct Continues
3 Unabated**

4 As a result of Reilly and BOA's wrongful conduct, some E*TRADE
5 customers have unfortunately transferred their accounts to BOA. *Id.* ¶ 39. The
6 resulting damages are unascertainable at this time, and E*TRADE's future loss is
7 incalculable. Other E*TRADE customers that Reilly solicited might not have
8 transferred their accounts to BOA, but their wrongful conduct has had serious, far-
reaching effects on E*TRADE that cannot be measured monetarily:

- 9 • Loss of confidentiality of customer information, loss
10 of confidentiality of customers' dealings with
E*TRADE, loss of confidence and trust of customers;
and
- 11 • Loss of valuable existing and prospective customer
12 relationships, destruction of E*TRADE's goodwill,
and loss of business reputation.

13 *Id.* at ¶¶ 45-47.

14 If the Court does not grant a preliminary injunction, Defendants' wrongful
15 actions will continue:

- 16 • Defendants will continue to have possession or control
17 of E*TRADE's Confidential Information,
E*TRADE's proprietary information, and E*TRADE
trade secrets;
- 18 • Defendants will continue to use confidential customer
19 information to solicit E*TRADE accounts to divert the
business of E*TRADE customers from E*TRADE to
BOA; and
- 20 • Defendants will otherwise continue to engage in acts
21 constituting a breach of the terms of their
employment agreements; breaches of their fiduciary
duty; and other tortious conduct, including
misappropriation of trade secrets, and tortious
interference with business relations.

22 **III. PROCEDURAL POSTURE**

23 Because all the parties in this case are FINRA members, E*TRADE must
24 obtain a permanent injunction and damages through mandatory arbitration.

25 FINRA Procedural Rule 13200. However, only this Court can provide preliminary

1 injunctive relief. FINRA Procedural Rule 13804(a)(1). In these situations, courts
 2 routinely enter preliminary injunctions to freeze the *status quo* pending the outcome
 3 of FINRA arbitrations.³

4 BOA has often used these same procedures to protect its confidential
 5 information. In the last five years, BOA has filed almost 20 actions for preliminary
 6 injunctions against former employees whom it accused of stealing confidential
 7 information. *See, e.g., Bank of America Investmt. Servs., Inc. v. Ellis*, 05 Civ. 2507
 8 (NRB) (S.D.N.Y.), Motion for Preliminary Injunction (filed March 2, 2005)
 9 (“*Ellis*”); *Banc of America Investmt. Servs., Inc. v. Harvie*, No. 3:08-cv-97-HEH
 10 (E.D. Va.), Motion for Preliminary Injunction (filed Feb. 6, 2008) (“*Harvie*”).
 11 BOA argued that “injunction relief is authorized pending arbitration”; *Ellis*, BOA
 12 Mem. in Supt. of Mo. for Prelim. Inj., at 15-16 (“BOA *Ellis* Mem.”), attached
 13 hereto as Exh. 2; *Harvie*, BOA Mem. in Supt. of Mo. for Prelim. Inj., at 5-6 (“BOA
 14 *Harvie* Mem.”), attached hereto as Exh. 4. In these cases, BOA asked for a
 15 preliminary injunction pending BOA’s arbitration at FINRA against its former
 16 employee. *See* BOA *Ellis* Mem. at 15-16; BOA *Harvie* Mem. at 5-6.

17 IV. ARGUMENT

18 A. The Standard For Issuing A Preliminary Injunction

19 To obtain a preliminary injunction, a plaintiff must demonstrate: “(1) a
 20 strong likelihood of success on the merits; (2) the possibility of irreparable injury to

21 ³ *See Credit Suisse Sec. (USA) LLC v. Ebling*, No 06-11339, 2006 WL
 22 3457693, at *3 (S.D.N.Y. Nov. 27, 2006) (“Without a preliminary injunction, the
 23 harm that Petitioner seeks to address via arbitration will occur before the arbitrator
 24 can render a decision, and Petitioner will lose its right to meaningfully resolve these
 25 employment disputes via arbitration.”); *First Empire Secs., Inc. v. Miele*,
 26 No. 20247-2007, 2007 WL 2894245 at *3 (N.Y. Sup. Ct. Aug. 10, 2007) (“The
 27 Court is cognizant that this matter will proceed to arbitration, but the rules of
 28 FINRA f/k/a NASD (National Association of Securities Dealers) specifically refer
 to the possibility that in an appropriate situation the Court may issue an injunction
 that could be subsequently addressed in the FINRA/NASD forum by both parties
 during arbitration.”).

1 plaintiff if the preliminary relief is not granted; (3) a balance of hardships favoring
 2 the plaintiff; and (4) advancement of the public interest (in certain cases).” *Global*
 3 *Horizons, Inc. v. U.S. Dept. of Labor*, 510 F.3d 1054, 1057 (9th Cir. 2007) (quoting
 4 *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995).

5 B. E*TRADE Is Likely To Be Successful On The Merits

6 1. *Reilly Breached His Employment Agreement*

7 E*TRADE is likely to prevail on its claim against Reilly for breach of
 8 contract. Complaint Count I, ¶¶ 52-58. As detailed above, Reilly promised not to
 9 remove E*TRADE’s Confidential Information from E*TRADE, not to use
 10 E*TRADE’s Confidential Information for “personal” use or in competition against
 11 E*TRADE, and to return or destroy any Confidential Information after he left
 12 E*TRADE. *See* ¶ II.B *supra*. His handwritten notes and the trail of calls to
 13 E*TRADE’s customers after he left shows that, in fact, he did exactly what his
 14 employment contract prohibited. *See* ¶ II.C *supra*.

15 Under essentially identical facts, BOA recently argued in a Virginia lawsuit
 16 that it was “likely to succeed on the merits” of its claims against two former
 17 employees. The employees had similar restrictions as Reilly – commitments not to
 18 solicit BOA’s customers after they left, and promises not to take customer
 19 information from BOA. BOA *Harvie* Mem. at 10. BOA showed that both
 20 defendants breached these obligations, and argued that this constituted a “likelihood
 21 of success on the merits” of BOA’s lawsuit authorizing preliminary injunctive
 22 relief. *Id.*

23 2. *Reilly Breached His Fiduciary Duty Of Loyalty*

24 Reilly also breached his fiduciary duty of loyalty to E*TRADE. *See*
 25 Complaint Count II, ¶¶ 59-64. As an employee, Reilly “owe[d] undivided loyalty
 26 to his employer” E*TRADE. *Huong Que, Inc. v. Luu* (2007) 150 Cal. App. 4th
 27 400, 414; *Stokes v. Dole Nut Co.* (1995) 41 Cal. App. 4th 285, 295 (“[A]n employer
 28 has the right to expect the undivided loyalty of its employees. The duty of loyalty is

1 breached, and may give rise to a cause of action in the employer, when the
 2 employee takes action which is inimical to the best interests of the employer.”);
 3 *Fowler v. Varian Assocs., Inc.* (1997) 196 Cal. App. 3d 34, 41 (“California law
 4 does not authorize an employee to transfer his loyalty to a competitor. During the
 5 term of employment, an employer is entitled to its employees’ ‘undivided
 6 loyalty.’”). This duty encompassed several fiduciary obligations, including:

7 [t]he duty “to refrain from competing with the principal
 8 and from taking action on behalf of or otherwise assisting
 9 the principal’s competitors” . . . and the duty “not to use or
 communicate confidential information of the principal for
 the agent’s own purposes or those of a third party.”

10 *Huong Que*, 150 Cal. App. at 416 (quoting Rest.3d, Agency, §§ 8.04, 8.05(2)).
 11 Reilly breached both of these duties. While still employed at E*TRADE he was
 12 already competing with E*TRADE by soliciting customers to transfer their
 13 business to BOA, and he communicated E*TRADE’s Confidential Information for
 14 his own purposes as well as those of BOA. *See ¶ II.C supra*. No question exists
 15 that his actions damaged E*TRADE. *See ¶ II.E supra*.

16 **3. *Reilly And BOA Misappropriated E*TRADE’s Secrets***

17 E*TRADE is also likely to succeed on its claim that Reilly and BOA
 18 misappropriated E*TRADE’s trade secrets. Complaint Count III, ¶¶ 65-71.

19 The California Civil Code defines “Trade Secret” as “information . . . that
 20 (1) Derives independent economic value, actual or potential, from not being
 21 generally known to the public or to other persons who can obtain economic value
 22 from its disclosure or use; and (2) Is the subject of efforts that are reasonable under
 23 the circumstances to maintain its secrecy.” Cal. Civ. Code § 3426.1(d).
 24 E*TRADE’s customer lists and customer account data constitute trade secrets
 25 under this test. The information is extremely valuable to E*TRADE’s business and
 26 provides value to other businesses like BOA. *See ¶ II.A supra*. E*TRADE makes
 27 extensive efforts to protect the confidentiality of its Confidential Information,

28

1 including protecting computer systems and placing contractual restrictions on
 2 employees. *Id.*

3 Under similar circumstances, courts agree that customer lists and customer
 4 information qualify as “trade secrets” under the Code. *Morlife, Inc. v. Perry* (1997)
 5 56 Cal. App. 4th 1514, 1522 (affirming trial court finding that customer list was
 6 trade secret); *American Credit Indem. Co. v. Sacks* (1989) 213 Cal. App. 3d 622,
 7 630-32 (overturning trial court and finding that customer list constituted a trade
 8 secret, while identifying numerous other California court opinions also holding that
 9 customer lists can be a trade secret).

10 In California, “[a]ctual or threatened misappropriation may be enjoined.”
 11 Cal. Civ. Code § 3426.2. Courts ritually enjoin former employees who attempt to
 12 steal customers from their former employers. *E.g., Morlife*, 56 Cal. App. 4th at
 13 1527-28 (affirming trial court’s issuance of preliminary injunction against former
 14 employee who was soliciting plaintiff’s customers); *Vacco Indus., Inc. v. Van Den*
 15 *Berg* (1992) 5 Cal. App. 4th 34, 53-54 (affirming trial court’s entry of preliminary
 16 injunction “enjoining defendants’ further use and enjoyment of [the plaintiff]’s
 17 trade secrets”); *Sacks*, 213 Cal. App. 3d at 637 (enjoining defendants’ actual and
 18 threatened use of the plaintiff’s list); *Peerless Oakland Laundry Co. v. Hickman*
 19 (1962) 205 Cal. App. 2d 556, 559-61 (preliminary injunction appropriate where
 20 defendant was soliciting customers of his former employer).

21 Reilly and BOA are misusing, and will continue misusing, E*TRADE’s trade
 22 secrets. E*TRADE will prevail on this claim.

23 **4. *Reilly And BOA Engaged In Unfair Competition***

24 E*TRADE also has a valid claim under California Business and Professions
 25 Code § 17200, *see* Complaint Count V, ¶¶ 79-83, which prohibits “unfair
 26 competition” defined as “unlawful, unfair or fraudulent business act[s] or
 27 practice[s]” (“UCL”). A UCL action is equitable in nature and allows injunctive
 28 relief. *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal. 4th 1134, 1144.

1 “The ‘unlawful’ practices prohibited by section 17200 are any practices
 2 forbidden by law, be it civil or criminal, federal, state, or municipal, statutory,
 3 regulatory, or court-made.” *Saunders v. Super. Ct.* (1994) 27 Cal. App. 4th 832,
 4 838-39. Reilly’s and BOA’s liability for any of the foregoing causes of action
 5 thereby establishes a UCL claim as well. In addition, “[t]he statutory language
 6 referring to ‘any unlawful, unfair or fraudulent’ practice . . . makes clear that a
 7 practice may be deemed unfair even if not specifically proscribed by some other
 8 law.” *Cel-Tech Commc’ns., Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.
 9 4th 163, 180. Thus, even if E*TRADE does not prevail on any of its other claims,
 10 it may still prevail on its UCL claim. *Cf. Rigging Int’l. Maint. Co. v. Gwin* (1982)
 11 128 Cal. App. 3d 594, 606 (“A former employee’s use of confidential information
 12 obtained from his former employer to compete with his old employer . . . is
 13 regarded as unfair competition.”); *Peerless Oakland Laundry*, 205 Cal. App. 2d at
 14 559-61 (“courts regard as unfair competition, and will enjoin, the use by an
 15 employee to the prejudice of his former employer of the confidential information
 16 gained by the employee during his prior employment as to the business secrets of
 17 such employer”).

18 **5. *Reilly And BOA Tortiously Interfered With E*TRADE’s***
 19 ***Contractual Relations And Prospective Advantages***

20 Defendants’ conduct also constitutes tortious interference both with
 21 E*TRADE’s contractual relations as well as E*TRADE’s prospective advantages.
 22 Complaint Counts VI & VII, ¶¶ 84-97. These are similar torts.

23 To prove tortious interference with contractual relations, E*TRADE must
 24 show (1) valid contracts with third parties; (2) Reilly and BOA’s knowledge of
 25 these contracts; (3) Reilly and BOA’s intentional acts designed to induce a breach
 26 or disruption of the contractual relationship; (4) actual breach or disruption of the
 27 contractual relationship; and (5) resulting damage. *See Pac. Gas & Elec. Co. v.*
Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1126. All of these elements are

1 present here. Reilly (and his employer BOA, through *respondeat superior* and
 2 agency principles) knew that E*TRADE had contracts with E*TRADE's
 3 customers; Reilly and BOA set out to steal these customers and thus cause
 4 E*TRADE to lose the contracts; and in some cases Reilly and BOA were
 5 successful, thus damaging E*TRADE.

6 But even for those customers whom Reilly and BOA unsuccessfully
 7 attempted to steal, E*TRADE can still state a claim for disruption of contractual
 8 relations. "We have recognized that interference with the plaintiff's performance
 9 may give rise to a claim for interference with contractual relations if plaintiff's
 10 performance is made more costly or more burdensome." *Id.* at 1129. Thus,
 11 E*TRADE will prevail on this claim merely by showing "disruption" with its
 12 customer relationships, such as Reilly and BOA causing customers to have
 13 concerns with their E*TRADE accounts or with the fact that non-E*TRADE
 14 brokers possessed their E*TRADE information. *See ¶ II.E supra.*

15 Similarly, to prove tortious interference with prospective advantage,
 16 E*TRADE must show (1) the existence of an economic relationship between
 17 E*TRADE and its customers, containing a "probability of future economic benefit"
 18 to E*TRADE; (2) that Reilly and BOA knew of the existence of this relationship;
 19 (3) that Reilly and BOA intentionally engaged in wrongful conduct designed to
 20 interfere with or disrupt this relationship; (4) actual interference or disruption of the
 21 relationship; and (5) causation and damages. *See Della Penna v. Toyota Motor*
 22 *Sales, U.S.A., Inc.* (1995) 11 Cal. 4th 376, 389. The "wrongful conduct" must be
 23 unlawful conduct beyond the fact of the interference itself. *Id.* at 393; *see also*
 24 *Korea Supply Co.*, 29 Cal. 4th at 1159 ("an act is independently wrongful if it is
 25 unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory,
 26 common law, or other determinable legal standard."). Reilly and BOA engaged in
 27 the "wrongful conduct" of taking E*TRADE's Confidential Information without
 28

1 authorization and using it contrary to E*TRADE's interest, in violation of the terms
 2 under which Reilly was given access to the information.

3 E*TRADE is likely to prevail on both of these torts.

4 **6. *Reilly And BOA Violated The Federal Computer Fraud And***
 5 ***Abuse Act (18 U.S.C. § 1030)***

6 Finally, E*TRADE is likely to prevail on its claim against defendant Reilly
 7 under the federal Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030.
 8 See Complaint Count VIII, ¶¶ 98-104.⁴ A claim exists under the CFAA if: (1)
 9 defendants accessed E*TRADE's "protected computer," (2) without authorization
 10 or exceeding their authorization, (3) "knowingly" and with an "intent to defraud,"
 11 and (4) as a result have "further[ed] the intended fraud and obtain[ed] anything of
 12 value." 18 U.S.C. § 1030(a)(4); *P.C. Yonkers, Inc. v. Celebrations The Party &*
 13 *Seasonal Superstore, LLC*, 428 F.3d 504, 508 (3d Cir. 2005). In the CFAA,
 14 "fraud" means "wrongdoing," and "defraud" means "wrongs one in his property
 15 rights by dishonest methods or schemes." *Shurgard Storage Ctrs., Inc. v. Safeguard Self Storage, Inc.*, 119 F. Supp. 2d 1121, 1125-26 (W.D. Wash. 2000).

16 Courts have found former employees liable under the CFAA to their former
 17 employers where the employees access computer systems to steal trade secrets,
 18 such as customer lists, and use that information in competition against the former
 19 employers. *George S. May Intern. Co. v. Hostetler*, No. 04-1606, 2004 WL
 20 1197395, at *3 (N.D. Ill. May 28, 2004) (valid CFAA claim existed where an
 21 employee removed a company's protected materials from the computer system for
 22 the benefit of himself and a competitor); *Pacific Aerospace & Elecs., Inc. v. Taylor*,
 23 295 F. Supp. 2d 1188, 1195-96 (E.D. Wash. 2003) (CFAA routinely applied where
 24 customer lists are inappropriately taken by former employees); *Shurgard Storage*
 25 *Ctrs., Inc.*, 119 F. Supp. 2d at 1129 (valid CFAA claim stated where an employee
 26 e-mailed trade secrets to a competitor).

27
 28 ⁴ The CFAA provides for a private right of action. 18 U.S.C. § 1030(g).

1 E*TRADE is likely to prevail on its claim under the CFAA. First, its
 2 computer systems are highly protected, and employees are authorized to access the
 3 system strictly for purposes of their obligations to E*TRADE. *See ¶ II.A supra.*
 4 Second, E*TRADE has a “smoking gun” showing that Reilly copied proprietary
 5 client “numbers” and “key data” from E*TRADE’s system at the time as part of his
 6 preparations to leave E*TRADE, which was expressly outside the scope of his
 7 authorization. *See ¶ II.C supra.* Third, Reilly did so knowingly and with the
 8 intention to use the information in competition against E*TRADE. *Id.* Finally, he
 9 “obtained something of value” – the profitable relationships with E*TRADE’s
 10 customers. *See ¶ II.E supra.*

11 **C. E*TRADE Faces Continuing Irreparable Harm Absent
 12 Preliminary Relief**

13 No question exists that E*TRADE faces irreparable injury as a matter of law.
 14 As a general rule, courts frequently find an employer faces irreparable injury when
 15 a former employee leaves with trade secrets. *See generally Imi-Tech Corp. v.*
Gagliani, 691 F. Supp. 214 (S.D. Cal. 1986) (granting preliminary injunction after
 16 finding that the plaintiff would be irreparably harmed if former employees and their
 17 current employer were allowed to use plaintiff’s trade secrets); *Knudsen Corp. v.*
Ever-Fresh Foods, Inc., 336 F. Supp. 241, 244 (C.D. Cal. 1971) (“It is beyond
 18 question that the unauthorized use of trade secrets is enjoinable”). Solicitation of a
 19 former employer’s customers, which is probable without injunctive relief, also
 20 causes irreparable injury to the former employer: “California courts have held that
 21 the solicitation of a company’s clients by one of its former employees causes
 22 irreparable harm.” *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Chung*,
 23 No. 01-00659, 2001 WL 283083, at *5 (C.D. Cal. Feb. 2, 2001) (citing California
 24 cases).

25 Specifically in the financial services industry, this Court has repeatedly
 26 recognized brokerage firms suffer irreparable injury if one of its financial advisors
 27
 28

1 brings confidential customer lists to a competing broker. *See Chung*, 2001 WL
 2 283083, at *5 (finding irreparable injury after a broker brought customer
 3 information to a competing brokerage); *see also Merrill Lynch, Pierce, Fenner &*
 4 *Smith Inc. v. Garcia*, 127 F. Supp. 2d 1305, 1306 (C.D. Cal. 2000) (same).

5 The order in the *Chung* case explains the many reasons a firm like
 6 E*TRADE faces irreparable harm: “The Court finds that in the present case Merrill
 7 Lynch will suffer irreparable harm as a result of the breach of client confidentiality,
 8 conversion of Merrill Lynch's property and information, incalculability of damages,
 9 loss of goodwill, and the threat to office stability and procedures caused by
 10 Defendants' violations.” *Chung*, 2001 WL 283083, at *5; *see also Corporate*
 11 *Express Office Prods., Inc. v. Martinez*, No. 02-87, 2002 WL 31961458, at *5 (C.D.
 12 Cal. Mar. 8, 2002) (“If a preliminary injunction is not entered, Corporate Express
 13 may suffer continued customer losses, future sales, damage to long-term
 14 relationships with its customers, loss of referrals and loss of goodwill in the
 15 marketplace. Such damage is difficult to quantify and, in this context, constitutes
 16 irreparable harm.”).

17 Under virtually identical circumstances, BOA argued that irreparable injury
 18 is present as matter of law. BOA *Ellis* Mem., at 11-14; BOA *Harvie* Mem., at 8. In
 19 *Ellis*, BOA sued a broker who left BOA, allegedly taking BOA's confidential
 20 customer information with him. In seeking a preliminary injunction against their
 21 use of that information, BOA identified three separate kinds of irreparable harm:
 22 (1) indeterminable damages from the loss of customer relationships that might have
 23 been profitable “for years to come” (BOA *Ellis* Mem., at 12); (2) customers' loss of
 24 “trust and confidence” when their financial services firm appears to have lost their
 25 highly confidential information (*id.* at 13); and (3) the “threat to office stability,”
 26 that is, the threat of other firms being encouraged to poach more employees and
 27 steal yet more customer information (*id.* at 13-14). Similarly, BOA argued in the
 28 *Harvie* case two months ago – where two employees allegedly left with BOA

1 customer information – that irreparable harm is present when a former employee
 2 takes “customer data, which includes contact and financial information.” BOA
 3 *Harvie* Mem. at 8. BOA further stated, “Once a client moves an account, it is
 4 extremely difficult to regain it. This is particularly true if the client loses
 5 confidence in a company’s ability to keep his or her financial and personal
 6 information confidential.” *Id.* The Court should apply BOA’s arguments here too.

7 **D. The Balance Of Hardships Weighs Heavily In E*TRADE’s Favor**

8 The balance of hardships favors a preliminary injunction. This Court has
 9 noted that the burden on the defendant of refraining from using the former-
 10 employee’s trade secrets is slight and warrants the issuance of a preliminary
 11 injunction:

12 [T]he balance of hardships tips heavily in favor of
 13 granting injunctive relief because an injunction merely
 14 prohibits Defendants from misappropriating the trade
 15 secrets of Merrill Lynch, and requires them to comply
 16 with the reasonable terms of their Agreements. An
 17 injunction will not prevent the Defendants from
 continuing their employment in the securities industry,
 will not interfere with their ability to acquire even a fairly
 limited number of clients of the thousands of potential
 clients in the area, or from working for Smith Barney in
 the community in which Defendants have chosen to work.

18 *Chung*, 2001 WL 283083, at *6; *see also Garcia*, 127 F. Supp. 2d at 1306
 19 (concluding that the balance of hardships favored a preliminary injunction where a
 20 broker began soliciting his former-employer’s customers after leaving the
 21 company).

22 BOA made these very same arguments in its recent action against former
 23 employees in Virginia. BOA demonstrated that it would face irreparable harm from
 24 defendants’ continued use of BOA’s customer lists and trade secrets, whereas the
 25 brief injunction until FINRA resolved BOA’s arbitration claim would not stop the
 26 defendants from earning their living. As BOA stated, “The ‘balance of hardships’
 27 is overwhelmingly in favor of [BOA].” BOA *Harvie* Mem., at 8.

28

1 **E. The Public Interest Favors An Injunction**

2 Finally, the public interest favors injunction relief to protect E*TRADE's
 3 trade secrets. *See Gable-Leigh, Inc. v. N. Am. Miss.*, No. 01-01019, 2001 WL
 4 521695, at *20 (C.D. Cal. Apr. 13, 2001) ("The issuance of an injunction on Gable-
 5 Leigh's trade secrets claim will promote the public interest because it is in the
 6 public interest that trade secret customer lists be protected."); *Chung*, 2001 WL
 7 283083, at *6 (finding a public interest in protection of "trade secret client lists and
 8 other confidential and trade secret information"); *Garcia*, 127 F.Supp.2d at 1306
 9 (C.D. Cal. 2000) ("The public interest is advanced by granting injunctive relief thus
 10 protecting client property and Plaintiff's trade secrets.").

11 The Supreme Court has even commented that the public interest would **never**
 12 lie with someone misusing ill-gained customer lists:

13 [It] is hard to see how the public would be benefited by
 14 disclosure of customer lists or advertising campaigns; in
 15 fact, keeping such items secret encourages businesses to
 16 initiate new and individualized plans of operation, and
 17 constructive competition results. This, in turn, leads to a
 greater variety of business methods than would otherwise
 be the case if privately developed marketing and other
 data were passed illicitly among firms involved in the
 same enterprise.

18 *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 483 (1974).

19 **F. The Alternative Formulation Supports An Injunction**

20 The Ninth Circuit also uses an alternative test requiring a plaintiff to
 21 demonstrate either a combination of probable success on the merits and the
 22 possibility of irreparable injury, or serious questions going to the merits and that the
 23 balance of hardships tipping sharply in the plaintiff's favor. *Raich v. Ashcroft*, 352
 24 F.3d 1222, 1227 (9th Cir. 2003), *vacated on other grounds*, *Gonzales v. Raich*, 545
 25 U.S. 1 (2005). These two tests are not inconsistent, but rather represent a
 26 continuum of equitable discretion whereby "the greater the relative hardship to the
 27 moving party, the less probability of success must be shown." *Id.* (quoting *Nat'l
 Ctr. for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1369 (9th Cir. 1984)). Thus,

1 where the balance of relative hardship tips sharply in the movant's favor, it need
 2 only demonstrate "a fair chance of success on the merits." *Sports Form, Inc. v.*
 3 *United Press Int'l, Inc.*, 686 F.2d 750, 753 (9th Cir. 1982).

4 Under this alternative formulation, preliminary injunctive relief is warranted.
 5 E*TRADE has at least raised "serious questions" on the merits of its claims and, as
 6 explained above, the balance of hardships tips sharply in his favor.

7 **V. CONCLUSION**

8 All of the relevant factors lie in favor of the preliminary relief E*TRADE
 9 seeks. For those reasons, E*TRADE respectfully requests that this Court issue and
 10 grant a preliminarily injunction requested in E*TRADE's Complaint, at p. 18-19.

11 Dated: March 27, 2008

COOLEY GODWARD KRONISH LLP
 MICHELLE C. DOOLIN (179445)
 DARCI A. TILLY (239715)

12
 13
 14 /s/Michelle C. Doolin
 15 Michelle C. Doolin (179445)
 16 Attorneys for Plaintiffs
 E*TRADE FINANCIAL CORPORATION
 and E*TRADE SECURITIES LLC

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24
 25
 26
 27
 28

CERTIFICATE OF SERVICE

I, Michelle C. Doolin, state that on the 27th day of March, 2008, I served the following by FedEx overnight service: Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction in Aid of Arbitration to the following parties:

Banc of America Investment Services, Inc.
c/o CT Corporation System, Its Registered Agent
818 West Seventh Street
Los Angeles, CA 90017

Joseph S. Reilly
3314 Sage Street
Tustin, CA 92782-1934

Joseph S. Reilly
Banc of America Investment Services, Inc.
500 Newport Center Drive
Newport Beach, CA 92660

/s/ Michelle C. Doolin
Michelle C. Doolin

EXHIBIT 4

COOLEY GODWARD KRONISH LLP
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Attorneys for Plaintiffs
E*TRADE FINANCIAL CORPORATION
E*TRADE SECURITIES LLC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

E*TRADE FINANCIAL
CORPORATION and
E*TRADE SECURITIES LLC,

Plaintiffs,

V.

JOSEPH S. REILLY and
BANC OF AMERICA
INVESTMENT SERVICES, INC.

Defendants.

Case No. CV08-1963 AHM (FMOx)

**DECLARATION OF CURT B.
RADETICH IN SUPPORT OF
E*TRADE'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION IN AID OF
ARBITRATION**

CURT B. RADETICH declares as follows pursuant to 28 U.S.C. § 1746:

1. I am employed by E*TRADE Securities LLC ("E*TRADE") as

Branch Manager at Costa Mesa Center, 3200 Bristol Street, Suite 120, Costa Mesa, California 92626 (“Costa Mesa Branch”).

1 2. I make this declaration in support of E*TRADE's Motion for
2 Preliminary Injunction in the above-captioned action against Joseph S. Reilly
3 ("Reilly") and Banc Of America Investment Services, Inc. ("BOA").
4

5 3. As the Branch Manager of the Costa Mesa Branch, my duties include
6 supervising employees, addressing issues surrounding the departure of E*TRADE
7 employees and compliance with company policies to protect the confidentiality of
8 customer information and E*TRADE proprietary information. As a Branch
9 Manager, I regularly access E*TRADE's databases about customer information,
10 including their contact information and account histories. I also regularly access
11 E*TRADE's employee records.
12

13 4. Beginning in June 2007, I supervised Reilly at the Costa Mesa Branch.
14 Reilly was an E*TRADE Financial Advisor.
15

16 5. Reilly is a registered member of the Financial Industry Regulatory
17 Agency ("FINRA"). FINRA provides publicly available records of each of its
18 members, called "BrokerCheck Reports." These are available on the Internet.
19 I have reviewed FINRA's BrokerCheck Report for Reilly, and it states that he is
20 currently employed as a financial adviser at BOA. I am attaching a copy of the
21 current BrokerCheck Report for Reilly as Exhibit 1, which I obtained on the
22 Internet at the website listed on the printout.
23

24 6. BOA is a direct competitor of E*TRADE in the investment advisory
25 and brokerage asset management business.
26

1 **E*TRADE's Customer Relationships**

2 7. The investment advisory and brokerage asset management industry is
 3 highly competitive, and is built on the development of long-term relationships with
 4 clients in need of investment advisory and wealth management services.

5 8. Because many products and services provided by competing firms
 6 offer capabilities and pricing that are similar, client decisions to place their business
 7 with a particular firm are often driven by the client's relationship with the firm.

8 9. In order to continue to build its business and maintain its reputation as
 9 a premier service provider in the industry, E*TRADE has expended substantial
 10 time, labor, and money to attract, develop, service and maintain relationships with
 11 its clients and to find, train and develop its employees.

12 10. E*TRADE's goodwill and business relationships with its customers
 13 and employees are one its most valuable assets. Customers have many options in
 14 the industry and E*TRADE's ability to attract and retain customers is primarily
 15 dependent on the customers believing they receive superior attention and quality of
 16 services from E*TRADE at a competitive price.

17 11. E*TRADE employs Financial Advisors ("FAs") to enhance its
 18 relationship with many customers, particularly those who have large assets on
 19 deposit and generate substantial revenues for E*TRADE (generally known in the
 20 industry as "high net worth" individuals). Unlike other business models where a
 21 brokerage firm's FAs recruit customers and consider the customers their own
 22

1 “clients,” E*TRADE’s FAs are merely used in a support role and they are not
 2 expected to actively solicit business from non-E*TRADE clients. E*TRADE’s
 3 brokerage customers are recruited not by FAs but by E*TRADE’s other business
 4 operations, such as marketing and internal referrals from other business lines (for
 5 example, E*TRADE Bank or E*TRADE Mortgage).
 6
 7

8 12. Instead, E*TRADE FAs provide services solely to either existing
 9 E*TRADE customers, or customers who contact E*TRADE FAs in response to
 10 E*TRADE’s corporate marketing and advertising. E*TRADE usually assigns a
 11 specific FA to a particular customer, so that the customer has a single point of
 12 contact with E*TRADE, which enhances the customer’s view of E*TRADE.
 13 However, E*TRADE does not consider these customers to be the specific “clients”
 14 of the FAs. E*TRADE can and does reassign FAs between customers for a variety
 15 of reasons.
 16
 17

E*TRADE Confidential Information

18 13. E*TRADE maintains confidential information about its customers and
 19 trade secrets (“Confidential Information”) in its databases. The databases include
 20 customer contact information, sensitive financial account information, trading
 21 histories, and logs of communications between the customers and E*TRADE
 22 employees and representatives.
 23
 24

25 14. E*TRADE has spent enormous resources to compile its Confidential
 26 Information. The information reflects years of E*TRADE’s efforts to attract and
 27
 28

1 maintain customers, as I explained above. E*TRADE's Confidential Information
2 essentially embodies all of E*TRADE's marketing investments for years, all of
3 E*TRADE's personal communications with customers, and E*TRADE's reputation
4 in the industry.

5 15. E*TRADE's Confidential Information would be extremely valuable to
6 E*TRADE's competitors like BOA. Competitors could use the information to
7 contact E*TRADE's customers to solicit their business away from E*TRADE. The
8 information also could provide each customer's unique situation, financial needs,
9 and account history that would allow a competitor to tailor a "sales pitch" specific
10 to that customer.

11 16. E*TRADE vigorously maintains the confidence of its databases and
12 the Confidential Information contained therein. E*TRADE has expended
13 enormous resources over many years to build its own internal, proprietary computer
14 network. E*TRADE maintains the information only on these internal E*TRADE
15 computer facilities, limiting access to those employees having the need to know of
16 it, and does not make the information accessible to non-E*TRADE individuals. All
17 access to the information requires entry of specific user passwords. E*TRADE has
18 a very large computer staff that constantly monitors E*TRADE's computer
19 networks for unauthorized access.

1 17. E*TRADE trains all of its employees how to access and use the
2 computer networks and in also trains employees not to release the information
3 outside of E*TRADE.

5 18. E*TRADE maintains an internal written policy regarding employee
6 access to and use of E*TRADE's Confidential Information. This policy is called
7 the "Code of Professional Conduct." I am attaching some relevant excerpts of the
8 Code of Professional Conduct as Exhibit 2.

10 19. All of E*TRADE's FAs sign employment agreements and expressly
11 agree to comply with E*TRADE's Code of Conduct. The employment agreements
12 and E*TRADE's Code of Conduct impose mandatory obligations to guard and
13 maintain the confidentiality of E*TRADE's Confidential Information, including the
14 personal financial information of its customers.

17 20. When an FA's employment with E*TRADE ends, regardless of
18 reason, E*TRADE follows certain procedures to secure and guard its Confidential
19 Information. Before leaving the building on the last day of employment, an FA
20 must submit to a reasonable search to verify that Confidential Information is not
21 being taken.

24 21. E*TRADE's Confidential Information is not generally known outside
25 E*TRADE and cannot possibly be compiled without proper access to E*TRADE's
26 confidential records. I cannot imagine how anyone could determine our lists of
27 customers, short of conducting a house-to-house nationwide survey. In addition,

1 I cannot imagine how anyone could possibly learn each customer's account history
 2 and financial information without access to E*TRADE's confidential computer
 3 databases.
 4

5 **Reilly's Employment Agreements With E*TRADE**

6 22. In December 2003, E*TRADE offered Reilly employment in the
 7 position of Investment Specialist in E*TRADE's offices in New York, NY. The
 8 employment letter notified Reilly of E*TRADE's confidentiality policies and
 9 enclosed a copy of E*TRADE's Proprietary Information Agreement. I obtained
 10 from Reilly's E*TRADE employee records Reilly's December 17, 2003 offer letter,
 11 and I am attaching as Exhibit 3 a true and correct copy of this letter.
 12

13 23. Reilly's position as Investment Specialist was later renamed to
 14 Financial Advisor. As a financial advisor, Reilly provided personalized investment
 15 strategies and advice to E*TRADE customers.
 16

17 24. Upon starting employment, Reilly signed an E*TRADE Employment
 18 Agreement dated January 5, 2004, which incorporated the Proprietary Information
 19 Agreement. I obtained a copy of this from Reilly's E*TRADE employee records
 20 the "Agreement Regarding Employment and Proprietary Information and
 21 Inventions" between E*TRADE and him, and I am attaching as Exhibit 4 a true and
 22 correct copy of this.
 23

24 25. Upon starting employment, Reilly also signed an Acknowledgement
 25 dated January 5, 2004, stating that he had received a copy of the E*TRADE Code
 26
 27

1 of Professional Conduct and that he had or would thoroughly review it. A true and
 2 correct copy of Reilly's executed January 5, 2004, Acknowledgement, which I
 3 obtained from Reilly's E*TRADE employee records, is attached as Exhibit 5.
 4

5 26. In May 2006, at his request Reilly transferred from E*TRADE's
 6 branch in New York, NY, to its branch in Costa Mesa, CA.
 7

8 **Reilly's Access To E*TRADE's Confidential Information**

9 27. To perform his job responsibilities and serve the needs of E*TRADE's
 10 customers, Reilly was entrusted with E*TRADE's Confidential Information,
 11 including customer lists containing customer contact and financial information, as
 12 well as E*TRADE marketing strategy, business plans and proprietary data.
 13

14 **Reilly's Resignation**

15 28. Reilly abruptly resigned on January 25, 2008, while I was out of the
 16 office at the dentist. Reilly was absent from the office for what he claimed was
 17 "sick leave" for several days before resigning. He came to the office briefly on
 18 January 24, 2008. The next day, January 25, while I was out of the office, he
 19 submitted his resignation. I was informed that Reilly resigned via a call to my
 20 mobile phone while I was sitting in the dentist's chair. I am attaching a true and
 21 correct copy of Reilly's resignation letter as Exhibit 6.
 22

23 29. Reilly's resignation and departure was so abrupt that he did not give
 24 E*TRADE the opportunity to follow normal termination procedures. In particular,
 25 Reilly did not participate in the procedure I described above where E*TRADE
 26

1 reminds employees not to take or use E*TRADE's Confidential Information [to] at
2 their new jobs.
3

4 30. After returning from the dentist, I discovered that Reilly had not
5 bothered to clean out his office and had left personal items such as a jacket. I also
6 discovered that Reilly had not cleaned up several work-related materials such as his
7 professional notebooks in his office containing his notes about communications
8 with customers, task lists, and so forth. I recognized the handwriting in the
9 notebooks as Reilly's handwriting.
10
11

12 31. Given his abrupt departure, I was very concerned that our customers
13 might have pending business that they expected Reilly to address, but which only
14 Reilly knew. I was happy to see that he left his professional notebooks because,
15 I hoped, they would contain references to his active matters for our customers.
16 I therefore began reading these professional notebooks to determine if there was
17 any information about his ongoing work for customers.
18
19

20 32. In one of these notebooks, a 3" x 5" notepad with Reilly's
21 handwriting, I discovered Reilly's list entitled "Transition To Do" with a single
22 task, "(1) Copy as Many Names #'s As Possible". I am attaching a true and correct
23 copy of this notebook page as Exhibit 7.
24
25

26 33. In another notepad, I discovered a list entitled "Leaving To Do" with
27 the following list:
28

(1) MEET W/ MERRILL, UBS, SMITH BARNEY – START DATE JAN

(2) CALL CLIENTS USING CELL TO DETERMINE

THEIR INTEREST IN COMING W/ ME

(3) PRINT OUT ALL KEY CLIENT DATA

(4) [BLANK]

I am attaching a true and correct copy of this notebook page as Exhibit 8.

34. On January 28, 2008, E*TRADE sent Reilly a letter re "Change of Employment" which expressly reminded Reilly that he continued to be bound by the confidentiality agreement he signed upon starting employment with E*TRADE. A true and correct copy of the letter sent to Reilly from E*TRADE dated January 28, 2008, is attached as Exhibit 9.

Customer Contacts After Reilly's Departure

35. E*TRADE also has a standard procedure to contact the specific customers whom an FA services, upon that FA's departure. Consistent with this standard procedure, I directed E*TRADE employees to contact the customers whose accounts were serviced by Reilly. It is E*TRADE's policy and standard practice that, when making these contacts with customers, E*TRADE representatives must make contemporaneous notes regarding the conversations. These contemporaneous notes are recorded in E*TRADE's confidential customer databases, to which I have access.

36. I have reviewed the notes made in the ordinary course of business by E*TRADE representatives who contacted the customers previously serviced by

1 Reilly. These notes indicate that many customers reported that they had been
 2 solicited by via telephone and in writing by Reilly after his resignation from
 3 E*TRADE. Reilly encouraged high net worth customers to transfer their accounts
 4 from E*TRADE to BOA.

6 37. For example, one customer told E*TRADE that Reilly had contacted
 7 the customer by phone and in writing on Saturday January 26, the day immediately
 8 after Reilly resigned. Reilly sent this customer Transfer of Account ("TOA") forms
 9 to transfer the customer's account from E*TRADE to Banc of America. The
 10 customer did not request these forms and Reilly would not have this customer's
 11 contact information except by improperly taking such information from E*TRADE.
 12

14 38. Many other customers complained and expressed outrage that their
 15 personal information was in the hands of a former E*TRADE employee without the
 16 customers' consent. Customers also stated that Reilly made inflammatory,
 17 disparaging and inaccurate remarks about E*TRADE, including questioning the
 18 solvency of E*TRADE and falsely stating or implying that the assets of E*TRADE
 19 customers were at risk. This last remark is demonstrably false, because E*TRADE
 20 maintains numerous types of insurance that fully protect all of the accounts and
 21 customer deposits that Reilly serviced.

25 39. As a result of Reilly's solicitations, some customers have left
 26 E*TRADE. Other customers, persuaded by what Reilly told them, have questioned
 27

1 E*TRADE's solvency, the safety of their assets contained in E*TRADE accounts,
2 and the security of their personal financial information.
3

4 **Specific Customer Contacts and Comments**

5 40. The following are examples of E*TRADE customer solicitations by
6 Reilly based on my review of notes maintained in E*TRADE's records following
7 Reilly's departure:
8

9 41. Reilly telephoned E*TRADE customer Max W., whom he had not
10 talked to for almost two years, and told this customer that he should transfer his
11 accounts from E*TRADE to BOA because E*TRADE was "a sinking ship"
12

13 42. Reilly telephoned E*TRADE customer Dan J. and told this customer
14 that he should transfer his account from E*TRADE to BOA because E*TRADE
15 was having financial problems.
16

17 43. Reilly sent E*TRADE customer Alfred L. numerous TOA forms to
18 enable this customer to easily transfer his E*TRADE accounts to BOA.
19

20 44. The above examples and quotations are taken from notes
21 contemporaneously kept in the ordinary course of business by E*TRADE
22 employees memorializing the conversations with these customers.
23

24 **Continuing Harm To E*TRADE**

25 45. E*TRADE has attained, and can only maintain, its present position in
26 the investment advisory and wealth management industry by preserving the
27 confidentiality of its Confidential Information, including but not limited to its
28

1 business plans and strategies, price lists and sales methods, customer and prospect
2 lists and other customer information.
3

4 46. Unless Reilly is enjoined from the conduct described above,
5 E*TRADE will be injured by the loss of confidentiality of customer information,
6 loss of confidentiality of customers' dealings with E*TRADE, loss of confidence
7 and trust of customers, loss of revenue from existing and prospective customer
8 relationships, loss of E*TRADE's goodwill, and loss of business reputation.
9

10 47. I cannot estimate the money E*TRADE will lose or has been damaged
11 by Reilly's conduct. I cannot predict how much future revenue E*TRADE would
12 have made from the customers whom Reilly solicited away from E*TRADE. I also
13 cannot predict how much money E*TRADE has lost as a result of other future
14 business from these customers or potential referrals from them. Even for customers
15 who remain with E*TRADE, I cannot calculate how much E*TRADE's
16 relationship has been damages as a result of Reilly shaking their confidence or view
17 of E*TRADE.
18
19
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1 I declare under penalty of perjury under the laws of the United States of America
2
3 that the foregoing is true and correct to the best of my knowledge.
4
5

6 Executed this 25 day of March, 2008, at Costa Mesa, California.



7
8 CURT B. RADETICH
9 E*TRADE Branch Manager
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CERTIFICATE OF SERVICE

I, Michelle C. Doolin, state that on the 27th day of March, 2008, I served the following by FedEx overnight service: Declaration of Curt B. Radetich in Support of E*TRADE's Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction in Aid of Arbitration to the following parties:

Banc of America Investment Services, Inc.
c/o CT Corporation System, Its Registered Agent
818 West Seventh Street
Los Angeles, CA 90017

Joseph S. Reilly
3314 Sage Street
Tustin, CA 92782-1934

Joseph S. Reilly
Banc of America Investment Services, Inc.
500 Newport Center Drive
Newport Beach, CA 92660

/s/ Michelle C. Doolin
Michelle C. Doolin

EXHIBIT 5

Case 2:08-cv-01963-AHM-FMO Document 7-7 Filed 03/27/08 Page 1 of 15

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6 Attorneys for Plaintiffs
7 E*TRADE FINANCIAL CORPORATION
E*TRADE SECURITIES LLC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

3 E*TRADE FINANCIAL
4 CORPORATION and
E*TRADE SECURITIES LLC,

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V.

**JOSEPH S. REILLY and
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Defendants.

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**DECLARATION OF CURT B.
RADETICH IN SUPPORT OF
E*TRADE'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION IN AID OF
ARBITRATION**

CURT B. RADETICH declares as follows pursuant to 28 U.S.C. § 1746:

1. I am employed by E*TRADE Securities LLC ("E*TRADE") as

23 Branch Manager at Costa Mesa Center, 3200 Bristol Street, Suite 120, Costa Mesa,
24 California 92626 (“Costa Mesa Branch”)

Case 2:08-cv-01963-AHM-FMO Document 7-14 Filed 03/27/2008 Page 1 of 2

EXHIBIT 7

REDACTED

Transferred To D.A.

① Copy As May Names #
As Possible

3 inch

INCH

Case 2:08-cv-01963-AHM-FMO Document 7-15 Filed 03/27/2008 Page 1 of 2

EXHIBIT 8

Leaves To Do

- ① March 11 December, 2008, Standard Data - Smart Data Test
- ② Call Officers (Local Police To Determine
Times, Targets, T1 Specific W/ File)
- ③ Prior Due And Next Forecast Data
- ④

EXHIBIT 6



Douglas P. Lobel

T: (703) 456-8019
dlobel@cooley.com

April 17, 2008

VIA FACSIMILE

Vanier Martin, Case Administrator
FINRA DISPUTE RESOLUTION
One Liberty Plaza
165 Broadway, 27th Floor
New York, New York 10006-1404

Re: FINRA Dispute Resolution Arbitration Number 08-00871
E*TRADE Securities LLC vs. Marcus J. Hernandez, Joseph S. Reilly,
Sean J. Gaffey, and Banc of America Investment Services, Inc.

Dear Ms. Martin:

We represent E*TRADE Securities LLC ('E*TRADE') in the above-referenced arbitration (the "Arbitration"). Yesterday, the U.S. District Court for the Southern District of New York granted E*TRADE's motion for a preliminary injunction in aid of arbitration against Marcus J. Hernandez, Sean J. Gaffey, and Banc of America Investment Securities, Inc., three of the four respondents in this Arbitration.

Yesterday's Order (which is attached) did not address Mr. Reilly, the fourth respondent in this Arbitration. A separate U.S. District Court will be ruling on E*TRADE's motion to enjoin Mr. Reilly and has scheduled a hearing on E*TRADE's motion for May 5, 2008.

In our Statement of Claim, we have alleged that all the individual defendants were acting in concert. To avoid inefficiencies and possible inconsistent results, we do not wish to bifurcate the Arbitration. Our understanding from conversations with your office is that the 15-day period for the expedited arbitration will not begin running until the final motion involving Mr. Reilly is resolved on May 5th.

Thank you for your attention to this matter.

Respectfully yours,

Douglas P. Lobel

cc: John O. Lukanski, Esq. (via email)
Tom Momjian, Esq. (via email)

Case 1:08-cv-02993-RJH Document 25 Filed 04/17/2008 Page 1 of 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

E*TRADE FINANCIAL CORPORATION and
E*TRADE SECURITIES LLC,

Plaintiffs,

v.

MARCUS J. HERNANDEZ,
SEAN J. GAFFEY, and
BANC OF AMERICA
INVESTMENT SERVICES, INC.

Defendants.

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: 4/11/08
DATE FILED: 4/11/08

No. 08 CV 2993 (RJH)

PROPOSED ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

Upon consideration of Plaintiffs' Motion for Preliminary Injunction ("Motion") and other submissions in support thereof, as well as upon consideration of the Opposition papers, evidence and argument submitted by Defendants, and having determined that:

1. Under Rule 13804(a) of the Financial Industry Regulatory Authority ("FINRA") (formerly NASD) Code of Arbitration Procedure for Industry Disputes, Plaintiffs E*TRADE Financial Corporation and E*TRADE Securities LLC (jointly "E*TRADE") have the right to seek preliminary injunctive relief from this Court pending an arbitration hearing before a panel of duly-appointed arbitrators;
2. The rights of E*TRADE with respect to its property, proprietary and confidential information, competitive interests, and contracts with Defendants Marcus J. Hernandez (collectively the "Individual Defendants") ("Hernandez") and Sean J. Gaffey ("Gaffey") are being and will continue to be violated by Defendants unless they are restrained therefrom;

Case 1:08-cv-02993-RJH Document 25 Filed 04/17/2008 Page 2 of 4

3. E*TRADE will suffer irreparable harm and loss if Defendants are permitted to
 - (a) misuse E*TRADE's confidential and trade secret customer information to Defendants' own use and benefit; and (b) wrongfully solicit and contact E*TRADE clients to do business with Defendants;
4. E*TRADE has no adequate remedy at law; and
5. Greater injury will be inflicted upon E*TRADE by the denial of preliminary injunctive relief than would be inflicted upon Defendants by the granting of such relief, and the public interest will be served by the issuance of injunctive relief.

IT IS ORDERED THAT:

1. E*TRADE's Motion is GRANTED.
the Individual
2. Effective immediately, Defendants, directly or indirectly, and whether alone or in concert with others, including any officer, agent, employee and/or representative of Defendant Banc of America Investment Services, Inc. ("BOA") are enjoined and restrained from:
 - A. Soliciting the business of any E*TRADE customer whom Defendants Hernandez and Gaffey served, or whose name became known to *the Individual* ✓
Defendants through E*TRADE's records;
 - B. Using, disclosing, or transmitting for any purpose, including the solicitation of business, the information contained in the records of E*TRADE, including but not limited to, the names, addresses, financial information, investment objectives and account information of any E*TRADE customer;
 - C. Destroying, erasing or otherwise making unavailable for further proceedings in this matter, or in any arbitration proceeding between the

Case 1:08-cv-02993-RJH Document 25 Filed 04/17/2008 Page 3 of 4

parties, any records or documents (including data or information maintained in computer media) in Defendants' possession or control which were obtained from or contain information derived from any E*TRADE records; and

D. Aiding, abetting, or encouraging any other person or entity to do any of the aforementioned acts.

3. Defendants, and anyone acting in concert or participation with Defendants (including Defendants' counsel and any agent, employee, officer or representative of BOA or any of its subsidiaries or affiliates), are further ordered to return to Plaintiffs' counsel any and all records or information pertaining to E*TRADE clients or business, and/or which were obtained by Hernandez and Gaffey as a result of their employment with E*TRADE (whether in original, copied, handwritten or any other form), and to purge any such information from their possession, custody, or control, within 24 hours of notice to Defendants or their counsel of the terms of the Court's Order; provided, however, that any information in computerized or electronic form (including, but not limited to, computers, BlackBerrys, Treos, Palm Pilots, mobile telephones and any other device in, or on, which data can be electronically stored) shall be provided by Defendants to their counsel within 24 hours of notice to Defendants or their counsel of the terms of the Court's Order, and Defendants' counsel shall preserve the integrity of such devices and data and immediately make any and all such devices and data available for inspection and duplication by Plaintiffs' counsel and/or computer forensic consultants.

4. Defendants are directed to identify all E*TRADE customers that they have solicited since terminating their employment with E*TRADE, or while in possession of E*TRADE's Confidential Information, or during the course of any wrongdoing set forth herein.

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Case 1:08-cv-02993-RJH Document 25 Filed 04/17/2008 Page 4 of 4

\$100,000.

5. E*TRADE is directed to post a bond of \$1,000.
6. This Order shall remain in full force and effect ~~until further order of this Court. arbitration panel on~~
7. Pursuant to the requirements of the Federal Arbitration Act, 9 U.S.C. §§ 3 & 4, ~~the merits of plaintiffs'~~
the parties are directed to proceed with arbitration before FINRA in accordance with Rule 13804 claims.
of the Code of Arbitration Procedure for Industry Disputes.

IT IS SO ORDERED.

ENTERED this 16 day of April, 2008.

BY THE COURT:



UNITED STATES DISTRICT JUDGE

357787 v2/RE

EXHIBIT 7

Coss & Momjian, LLP
Attorneys at Law
111 Presidential Boulevard, Suite 233
Bala Cynwyd, PA 19004
Telephone: 610-667-6800
Fax: 610-667-6620

VIA FEDERAL EXPRESS

April 17, 2008

Douglas P. Lobel
Cooley Godward Kronish LLP
One Freedom Square
11951 Freedom Drive
Reston, Virginia 20190

Re: Hernandez and Gaffey

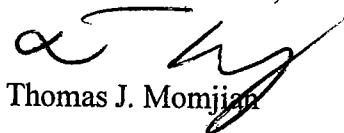
Dear Doug:

I returned to my office this morning and received a copy of the Court's Order. Pursuant to the Court's Order, I am enclosing materials returned by Mr. Gaffey and Mr. Hernandez.

Please give me a call if you have any questions.

Very truly yours,

COSS & MOMJIAN, LLP


Thomas J. Momjian

Enclosures

Coss & Momjian, LLP

Attorneys at Law

111 Presidential Boulevard, Suite 233

Bala Cynwyd, PA 19004

Telephone: 610-667-6800

Fax: 610-667-6620

VIA FEDERAL EXPRESS

April 18, 2008

Douglas P. Lobel
Cooley Godward Kronish LLP
One Freedom Square
11951 Freedom Drive
Reston, Virginia 20190

Re: Hernandez and Gaffey

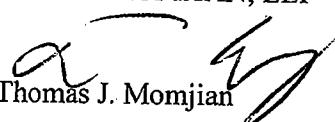
Dear Doug:

Pursuant to the Court's Order, I am enclosing additional materials returned by Mr. Hernandez and Mr. Gaffey.

Please give me a call if you have any questions.

Very truly yours,

COSS & MOMJIAN, LLP


Thomas J. Momjian

Enclosures

REDACTED

~~Dr. S A S~~
~~W El Campo Grand Ave.~~
~~NV~~
~~Las Vegas~~
~~(702) 3 - 2~~
~~Jnt acct - S +C.~~
~~IRA - S A S~~

~~A S~~
~~W El Campo Grand Ave.~~
~~NV~~
~~Las Vegas~~
~~(702) 3 - 2~~
~~Jnt acct - S +C.~~
~~IRA - S A S~~

~~B A~~
~~4 C S~~
~~San Diego CA~~
~~(858) 6 - 4~~
~~(858) 2 - 5~~
~~Individual - B A~~
~~Complete Savings account~~

~~E J. A~~
~~5 N. H St. #~~
~~Columbus, OH~~
~~(614) 4 - 1~~
~~Individual account - E J. A~~

~~R & D A~~
~~3. Gallery Lane~~
~~Evergreen, CO 80439~~
~~(719) 4 - 0~~

~~R A~~
~~2. Partridge Lane~~
~~Cherry Hill NJ 08003~~
~~(856) 4 - 3~~
~~(856) 6 - 7~~
~~8 different accounts~~

~~R A~~
~~2. Gunnar Drive~~

~~1800 Equities, Biotech stocks, Brokerage CDs, Structured notes in IRA-Equity and Currency~~

~~1/16/08 - 4/24/08 - See Stmt 1-12 - 08~~
~~2 - 1/16/08 - 4/24/08 - See Stmt 1-12 - 08~~
~~has history in SIX months - has to stick around.~~

~~Huge QCOM position 1Mln plus in XSF RX~~

~~1/16/08 - 4/24/08 - 6/1/08~~

~~92130~~

~~Short term Agencies, Municipal and Corps 1-4 years out~~
~~- 1/16/08 gave direct link to old Fannie Mae~~
~~accounts are giving to chart~~

~~43214~~

~~ms buy write, loans, son david handles ruthe's account, 200k coming in~~

~~GM, NJ Arps, NJ Munis~~

~~1/16/08 - 4/24/08 - 6/1/08~~

~~Banker 43 - 10/08~~

~~Banker 43 - 10/08~~

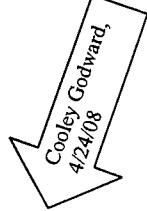
~~600 MFs -~~

~~CM - 1/16/08~~

~~IRA - 6/1/08~~

~~enriched~~

~~M 16 - TKA C Schaefer -~~



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R H S. Mulrfield Place
R 2 Urbana, IL 61802
(345) 9-0000
R S H & P.
R S H - IRA
P A H - Roth

P	P & C	H	
	Jericho Dr or		Jericho *sent out two cards
	Tryon, NC 28772		
(828) 8	-0		
P	R & C	C. H	- Joint
C	C - IRA		
P	R - IRA		

J & M H S. Hillcrest Ave
Springfield, MO 65807
(417) 8 - 4417-8 - 5 J M & M M. H. J. H. - Roth Conn Roth

2. Windsor Rd
River Edge, NJ 07661

HY Bonds, capine Distressed Level 3 ~

2-2028-08-CAT -

2-22-08-CAT -

xiacx, NC munis, Income
CAT w/ cat.

MF o shares, multi Ask friends for refs, uncomfortable with markets

-1-19-2008-08-technic

-1-19-2008-08-

-2-2008-12M + full hour 1p -

Steepener, nc munis - 1-19-08

1-19-2008-08-structure of my cat

1-19-2008-08-structure of my cat

Kite TTEES

500
-08
Cooler Go forward
424108

REDACTED

(201) 9 -5

B B
 1. N Astor 47 W
 Chicago, IL 60610
 (312)7 6
 Rev Trust Uas 6/2/2006 B. B TTEE
 Estate of G B B B J

R J
 2. Melody Dr
 San Carlos, CA 94070
 (650) 5 6

F J
 Davenport, FL
 863-4 .9

J - 30-08 - Spurts, Inc. Sc, coll w/ file no -

M J
 1 Derrydown Way
 San Diego, CA 92130
 (619) 8 -5
 Individual account
 J W R
 7 Coastal Dr.
 Harrison, TN 37341
 423-3 .2.

Dr. E J
 1 Sycamore Lane
 Clarks Summit, PA 18411
 (570) 4 2
 W. E J III& L A

Follow up
 1-29-08
 - Joint

4/24/08
 Colter Godward

1300 Qcom, Allianz funds, Multi Income, CA munis
 1-19-08 CMA
 public 1-28-08
 filing will be here & term no longer
 D-6-08
 2-12-08
 2-19-08 CMA
 1 M - 2-4-08 CMA
 2-11-08 - excess -

1300 Multi Income, XLACX, PA munis, Db carry trade, Lehman
 1-19-08 CMA
 LM follow up - 1-20-08

REDACTED

R S - Ira
R S - Ira
t. S - Ira

D S Box 3 Route 128 South
Cowden, IL 62422
(780) 2 1
(217) 6 3
(217) 7 2
RR Latern - S
Individ

S.
U. S. Post Office
5. East 8th Street Unit
New York, NY 10028
(917) 5 5
(212) 6 7
S. 100-14

T. S.
(804) 67 Calpine/AMD converts
Cheyenne WY

T S
3. East 7th St. Apt
New York, NY 10021
(817) 68

G	S						
2	Sugaryberry Circle						
	Houston, TX 77024						
	(281) 5	1					
	(713) 7	3					
G	S	C S	C S				
G	S	C S	C S				

1500 Multi Income fkinx xfax, sim, non dollar note,

~~- 2/1/08 - 1-10-08 -~~
~~- 2/1/08 - got fed~~
~~- 2/1/08 - left. 2/2-09 - decent connection~~
~~on trace sound. 1/27/08 -~~
~~- 2/1/08 - 2/1/08 -~~
~~- 2/1/08 - SPOT TC STTHT: all day~~

S
J 5. East 8th Street Unit
New York, NY 10028
(917)5 5
(212) 6 7

~~1-2227-22-08~~ - Means of

Mrs. SCHAFER - 1888 - Cities Teachers as for -

4000 Optax, XOSAX, pasax husa

~~5-08-08 - Country over App =~~

EXHIBIT 8

Location: [NASD](#) > [Manual](#) > [Rules of the Association](#) > [Procedural Rules \(8000–14000\)](#) > [13000. NASD Code of Arbitration Procedure for Industry Disputes](#) > [Part II General Arbitration Rules](#) > [13210. Ex Parte Communications](#)

[Previous](#)

[Next](#)

13210. Ex Parte Communications

The Industry Code will apply to claims filed on or after April 16, 2007. In addition, the list selection provisions of the Industry Code will apply to previously filed claims in which a list of arbitrators must be generated after April 16, 2007; in these cases, however, the claim will continue to be governed by the remaining provisions of the old Code unless all parties agree to proceed under the new Code. **Contact your case administrator for details.**

 Notices
(1 link)

(a) Except as provided in Rule 13211, no party, or anyone acting on behalf of a party, may communicate with any arbitrator outside of a scheduled hearing or conference regarding an arbitration unless all parties or their representatives are present.

(b) No party, or anyone acting on behalf of a party, may send or give any written motion, request, submission or other materials directly to any arbitrator, unless the arbitrators and the parties agree, or the Code provides otherwise.

Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07

[Previous](#)

[Next](#)

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EXHIBIT 9

Location: [NASD](#) > [Manual](#) > [Rules of the Association](#) > [Procedural Rules \(8000–14000\)](#) > [13000. NASD Code of Arbitration Procedure for Industry Disputes](#) > [Part III Initiating and Responding to Claims](#) > [13313. Multiple Respondents](#)

[**Previous**](#)

[**Next**](#)

13313. Multiple Respondents

The Industry Code will apply to claims filed on or after April 16, 2007. In addition, the list selection provisions of the Industry Code will apply to previously filed claims in which a list of arbitrators must be generated after April 16, 2007; in these cases, however, the claim will continue to be governed by the remaining provisions of the old Code unless all parties agree to proceed under the new Code. Contact your case administrator for details.

 Notices
(1 link)

(a) One or more parties may name one or more respondents in the same arbitration if the claims contain any questions of law or fact common to all respondents and:

The claims are asserted against the respondents jointly and severally; or

The claims arise out of the same transaction or occurrence, or series of transactions or occurrences.

(b) After all responsive pleadings have been served, claims joined together under paragraph (a) of this rule may be separated into two or more arbitrations by the Director before a panel is appointed, or by the panel after the panel is appointed. A party whose claims were separated by the Director may make a motion to the panel in the lowest numbered case to reconsider the Director's decision.

Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: [07-07](#)

[**Previous**](#)

[**Next**](#)

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EXHIBIT 10

Location: [NASD](#) > [Manual](#) > [Rules of the Association](#) > [Procedural Rules \(8000–14000\)](#) > [13000. NASD Code of Arbitration Procedure for Industry Disputes](#) > [Part II General Arbitration Rules](#) > [13207. Extension of Deadlines](#)

[:: Previous](#)[Next ::](#)

13207. Extension of Deadlines

The Industry Code will apply to claims filed on or after April 16, 2007. In addition, the list selection provisions of the Industry Code will apply to previously filed claims in which a list of arbitrators must be generated after April 16, 2007; in these cases, however, the claim will continue to be governed by the remaining provisions of the old Code unless all parties agree to proceed under the new Code. Contact your case administrator for details.



(a) The parties may agree in writing to extend or modify any deadline for:

Serving an answer;

Returning arbitrator or chairperson lists;

Responding to motions; or

Exchanging documents or witness lists.

If the parties agree to extend or modify a deadline under this rule, they must notify the Director of the new deadline in writing.

(b) The panel may extend or modify any deadline listed in paragraph (a), or any other deadline set by the panel, either on its own initiative or upon motion of a party.

(c) The Director may extend or modify any deadline or time period set by the Code for good cause. The Director may also extend or modify any deadline or time period set by the panel in extraordinary circumstances.

Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07

[:: Previous](#)[Next ::](#)

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EXHIBIT 11

84gletrc

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 E*TRADE FINANCIAL CORPORATION,
4 et al.,

5 Plaintiff,

6 v.

08-CV-2993 (RJH)

7 MARCUS J. HERNANDEZ; et al.,
8 Defendants.

Preliminary Injunction
Hearing

9 -----x
10 New York, N.Y.
11 April 16, 2008
12 2:36 p.m.

13 Before:

14 HON. RICHARD J. HOLWELL,

District Judge

15 APPEARANCES

16 COOLEY GODWARD KRONISH LLP
17 Attorneys for Plaintiffs
18 BY: DOUGLAS P. LOBEL, ESQ.
19 LAURA GROSSFIELD BIRGER, ESQ.

20 GIBBONS, P.C.
21 Attorneys for Defendants Hernandez and Gaffey
22 BY: PAUL A. SASO, ESQ.

23 COSS & MOMJIAN, LLP
24 Attorneys for Defendants Hernandez and Gaffey
25 BY: THOMAS J. MOMJIAN, ESQ.
CHRISTOPHER C. COSS, ESQ.

26 WOLFF & SAMSON, PC
27 Attorneys for Defendant Banc of America
28 BY: JOHN O. LUKANSKI, ESQ.

84g1etrc

1 assuredly that if we come up with say 13 examples or 11
2 examples, I mean, there's probably hundreds of examples that we
3 don't know about. So I think we have to look at it from that
4 perspective.

5 Last point, your Honor, on the FINRA rules, the rule
6 is that the Court can enter a preliminary injunction pending an
7 expedited hearing. The FINRA rules require that that hearing
8 be within 15 business days. There can be some minor
9 modifications to that, of course, but this will be an expedited
10 proceeding and the Court's order would be limited to
11 preliminary relief that would stay in effect, and it's up to
12 the arbitrators to alter that relief on the permanent
13 injunction, which they would hear, and then also on the
14 damages, which they would also hear. So we're only asking the
15 Court to maintain the status quo until that hearing occurs.
16 And so whatever harshness Banc of America thinks they
17 sustained, it's only for a very limited period of time until
18 the arbitrators sort it out.

19 Thank you, your Honor.

20 THE COURT: Thank you, counsel.

21 MR. MOMJIAN: May I have two seconds, your Honor?

22 THE COURT: Sure.

23 MR. MOMJIAN: Your Honor, the evidence with respect to
24 Mr. Hernandez now seems to boil down to this one Exhibit 5, and
25 I just note, your Honor, that that call occurred on